DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-996
Title: James Walker, Warden, et al., Petitioners
v.
Charles W. Martin
Docketed: February 23, 2010
Lower Ct.: United States Court of Appeals for the Ninth Circuit
Case Nos.: (08-15752)
Decision Date: November 20, 2009
Questions Presented

---Date---	--------Proceedings and Orders----------
Feb 17 2010	Petition for a writ of certioran filed. (Response due March 25, 2010)
Mar 9 2010	Waiver of right of respondent Charles W. Martin to respond filed.
Mar 24 2010	DISTRIBUTED for Conference of April 16, 2010.
Mar 24 2010	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Mar 29 2010	Response Requested. (Due April 28, 2010)
Apr 20 2010	Order extending time to file response to petition to and including May 19, 2010.
May 17 2010	Brief of respondent Charles W. Martin in opposition filed.
May 17 2010	Motion for leave to proceed in forma pauperis filed by respondent.
May 27 2010	Reply of petitioners James Walker, Warden, et al. filed.
Jun 1 2010	DISTRIBUTED for Conference of June 17, 2010.
Jun 21 2010	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jun 21 2010	Petition GRANTED.
Jun 21 2010	Motion to appoint counsel filed by respondent Charles W. Martin. (CL Page 163)
Jul 7 2010	Motion DISTRIBUTED for Conference of September 27, 2010.
Jul 13 2010	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including August 25, 2010.
Aug 23 2010	Joint appendix filed.
Aug 25 2010	Brief of petitioners James Walker, Warden, et al. filed.
Aug 30 2010	The time within which to file respondent's brief on the merits is extended to and including October 14, 2010.
Sep 1 2010	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Sep 7 2010	SET FOR ARGUMENT ON Monday November 29, 2010
Sep 14 2010	CIRCULATION
Sep 24 2010	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Sep 27 2010	U.S.D.C. for Eastern District of California record received from Chambers of Judge Sidney R. Thomas of the U.S.C.A. for 9th Circuit. (1 box)
Sep 29 2010	The time within which to file respondent's brief on the merits is further extended to and including October 20, 2010.
Oct 4 2010	Motion to appoint counsel filed by respondent GRANTED. Michael B. Bigelow, Esquire, of Sacramento, California, is appointed to serve as counsel for the respondent in this case.
Oct 20 2010	Brief of respondent Charles W. Martin filed. (Distributed)
Oct 27 2010	Brief amicus curiae of Cory R. Maples filed. (Distributed)
Oct 27 2010	Brief amici curiae of Federal Courts Scholars filed. (Distributed)
Oct 27 2010	Brief amici curiae of Federal Defenders for the Central, Eastern, Northern Districts of California and Federal Defenders of San Diego, Inc. filed. (Distributed)
Oct 27 2010	Brief amicus curiae of Habeas Corpus Resource Center filed. (Distributed)
Nov 19 2010	Reply of petitioners James Walker, Warden, et al. filed. (Distributed)

Nov 29 2010 Argued. For petitioners: Todd Marshall, Deputy Attorney General, Sacramento, Cal. For respondent: Michael B. Bigelow, Sacramento, Cal. (Appointed by this Court.)

PETITION FOR WRIT OF CERTIORARI

COPY

Supreme Court, U.S.
FILED

No. 09-996

FEB 17 2010

OFFICE OF THE CLERK

In the Supreme Court of the United States

JAMES WALKER, WARDEN, ET AL., *Petitioner,*

v.

CHARLES W. MARTIN, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under state law in California, a prisoner may be barred from collaterally attacking his conviction when the prisoner "substantially delayed" filing his habeas petition. In federal habeas corpus proceedings, is such a state law "inadequate" to support a procedural bar because (1) the federal court believes that the rule is vague and (2) the state failed to prove that its courts "consistently" exercised their discretion when applying the rule in other cases?

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James Walker, Warden of the California State Prison, Sacramento (the State), [1] respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND JUDGMENTS BELOW

The memorandum opinion of the Ninth Circuit, dated November 20, 2009, and reversing the district court's decision dismissing respondent Martin's federal habeas corpus petition, is unpublished. (Case No. 08-15752; App. 1-3.) The district court judgment of March 28, 2008, is unpublished (Case No. CIV S 99-0223 WBS GGH P; App. 4-19), as are the magistrate's underlying March 10, 2008, Findings and Recommendations (F&Rs) that respondent's federal petition be dismissed as procedurally defaulted

The earlier memorandum opinion of the Ninth Circuit, dated July 26, 2006, and reversing the district court's earlier judgment dismissing the petition, is unpublished. (Case No. 05-15524; App. 20-23.) That March 8, 2005, judgment is unpublished (Case No. CIV S 99-0223 WBS GGH P; App. 25-59), as are the magistrate's August 6 and November 8, 2004, F&Rs recommending that respondent's petition be dismissed as procedurally defaulted.

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment reversing the dismissal of respondent's federal habeas corpus petition on November 20, 2009. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.1.

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[1] Warden Walker currently has custody of respondent.

STATEMENT OF THE CASE

The Crime and Trial

Respondent and an accomplice robbed and killed a drug dealer for money and drugs. Respondent was convicted of special circumstance murder and received a life without the possibility of parole sentence.

State and Federal Post trial Proceedings

In February 1999, respondent filed a petition for writ of habeas corpus in the federal district court. The district court determined that only two of respondent's claims had been exhausted by presentation to the state high court. Respondent was granted a stay of the federal proceedings so that he could go back to the California Supreme Court and exhaust his state remedies on his new claims.

Respondent filed his second California Supreme Court petition for writ of habeas corpus in March 2002, five years after his conviction became final and more than three years after the state supreme court rejected his first state petition. Respondent claimed that his trial counsel was ineffective for failing to investigate witnesses and third party culpability, and for not preventing the admission of certain evidence. Respondent also attacked the effectiveness of his state appellate counsel, claiming that she failed to raise issues of prosecutorial misconduct, denial of confrontation, and insufficient evidence in the California Supreme Court on direct review.

The California Supreme Court denied this petition in September 2002, with a citation to *In re Clark*, 5 Cal. 4th 750, 855 P.2d 729 (1993) and *In re Robbins*, 18 Cal. 4th 770, 780, 959 P.2d 311, 317 (1998). The California habeas corpus timeliness rule requires state habeas litigants to file their habeas claims promptly and without substantial unexplained delays. Petitioners must disclose when

they first learned of their claims and why they did not file sooner. Petitioners who file after substantial delay without adequate justification may still obtain merits review if they qualify for one of four enumerated exceptions. *In re Robbins*, 18 Cal. 4th at 780-81, 959 P.2d at 317-18. These rules apply equally to both capital and non-capital litigants. *In re Clark*, 5 Cal. 4th at 783, 855 P.2d at 751.

Respondent returned to federal court and filed an amended petition in January 2003. The state moved to dismiss the petition on the basis that some of the claims were too late under the federal statute of limitations. 28 U.S.C. § 2244. The state also argued that all six of respondent's claims were procedurally barred because they had been forfeited under independent and adequate state grounds. Some of these claims could have been raised or were raised upon direct appeal, and therefore could not be raised in a habeas petition. The remaining claims were procedurally barred because they had been forfeited under the *Clark/Robbins* procedural rule in state court.

The magistrate found that some claims were too late under the statute of limitations. The magistrate found that other claims were procedurally barred because they could have been raised before the state high court on direct appeal but were not or were actually raised on direct appeal and could not be re raised upon habeas corpus. *In re Waltreus*, 62 Cal.2d 218, 225, 397 P.2d 1001, 1005 (1965); *In re Dixon*, 41 Cal. 2d 756, 759, 264 P.2d 513, 514 (1953).

Next, the magistrate concluded that claim 3 (ineffective assistance of trial counsel for failure to investigate witnesses and present a defense of third party culpability), claim 4 (ineffective assistance of trial counsel for failure to effectively object to the admission of evidence), claim 5 (denial of personal presence at part of the trial), and claim 6 (ineffective assistance of appellate counsel) were all procedurally barred because they were not presented to the state high court in a timely fashion (*Clark/Robbins*). The magistrate enforced these procedural bars, he explained, because respondent had not made a

sufficient factual allegation that the state procedural rule was inconsistently applied to shift the burden of proof to the state under *Bennett* v. *Mueller*, 322 F.3d 573 (9th Cir. 2003).

Respondent did not challenge the procedural bar that was applied to dismiss claims 1 and 2. Instead, he challenged the procedural bar applied to claims 3 through 6, arguing that he had sufficiently challenged the adequacy of the state's timeliness bar to shift the burden of proof of "adequacy" back to the State.

In March 2005, the district court agreed with the magistrate and dismissed the entire petition.

On appeal in 2006, the Ninth Circuit agreed that some of respondent's claims were too late under the AEDPA Statue of limitations. However, the Ninth Circuit reversed the district court and remanded claims 3, 4, and parts of claim 6 for a determination of the "adequacy" of the state's timeliness rule. (Case No. 05-15524; App. 20-23.)

On remand, the state moved for dismissal again in the district court. On March 10, 2008, the magistrate issued F&Rs that recommended that the remaining claims be dismissed as procedurally barred. The magistrate found that California's time bar had been sufficiently clarified and consistently applied to bar federal review of Respondent's remaining claims. Specifically, the magistrate found that California's timeliness policies apply, on the whole, to both capital and non-capital litigants. The magistrate found further that the rule could be easily distilled to its essence and that it was therefore clearly defined and well established for non-capital habeas cases. The magistrate also explained that the California Supreme Court had published a number of decisions which supported the need to apply the timeliness bar. The magistrate then identified a series of both published and unpublished cases which supported a finding that the timeliness rule was consistently applied. On March 28, 2008, the district court ordered the F&Rs adopted in full. (Case No. CIV S 99-0223 WBS GGH P; App. 4-19.)

In an unpublished memorandum opinion by the Ninth Circuit dated November 20, 2009, the court of appeals reversed the district court's judgment. The Ninth Circuit held that California's habeas corpus time bar was "inadequate" because it is vague and inconsistently applied. The Ninth Circuit explained that California "has chosen to employ an undefined standard of 'substantial delay' in denying state habeas petitions for untimeliness, rather than using fixed statutory deadlines," and that the state had not proven that the state courts "consistently" applied the rule in other cases. Based upon this asserted lack of specificity, the Ninth Circuit concluded that the state had not met its burden of showing that the standard is clear or consistently applied. The Ninth Circuit remanded the matter for a merits determination. (Case No. 08-15752; App. 1-3.)

REASONS FOR GRANTING THE WRIT

BECAUSE THE NINTH CIRCUIT HAS REFUSED TO HONOR CALIFORNIA'S TIMELINESS RULINGS, THIS CASE PRESENTS IMPORTANT ISSUES CONCERNING STATE SOVEREIGNTY AND THE FINALITY AND ADEQUACY OF STATE JUDGMENTS WHICH THIS COURT HAS INDICATED NEED TO BE CLARIFIED FURTHER

Federal courts, particularly habeas corpus courts, should presume the good faith validity of a state-court procedural-default ruling that is levied against a petitioner who violated a state rule despite notice and an opportunity to comply and present claims in conformity with the rule. Rather, when answering the federal issue of "adequacy," the federal habeas corpus court should accept the state-court procedural bar as "adequate" unless extraordinary circumstances exist.

In addition, actual practice shows that review for discretionary or inconsistent enforcement of state procedural rules is wasteful and unreliable. Such

review causes federal courts to engage in untenable second-guessing of the state court's pronouncements upon their own state-law questions. This Court should end such practices now.

This case presents important issues involving state sovereignty and the finality of state judgments. See, Supreme Court Rule 10(a). Indeed, this Court's recognition of the importance of the question presented may be inferred from its recent grant of certiorari and subsequent opinion in *Beard* v. *Kindler*, 130 S.Ct. 612 (2009). The *Kindler* opinion suggests the need to further clarify the rules relating to the "adequacy" of state procedural bars. *Id.*, 130 S.Ct. at 619 (because the facts underlying the case were unique, the case presented an "unsuitable vehicle for providing broad guidance on the adequate state ground doctrine.") Justice Kennedy in his concurring opinion also suggested that if federal courts insist that a state procedural rule be established in all of its detail before it will be given effect in federal court, it would deprive the states of the case-law decisional approach that the federal judiciary finds proper and necessary in administering its own procedural rules. Justice Kennedy concluded that such important concerns should be addressed in the "proper case." *Kindler*, 130 S.Ct. at 620 (Kennedy, J., concurring) This case is the right vehicle to provide broad guidance on the adequate state ground doctrine and address these further areas of concern.

The practical importance of the question cannot be gainsaid. The Ninth Circuit has in effect killed California's habeas corpus timeliness bar within the federal procedural default context. *Morales* v. *Calderon*, 85 F.3d 1387 (9th Cir. 1996); *Bennett* v. *Mueller*, 322 F.3d 573; *King* v. *LaMarque*, 464 F.3d 963 (9th Cir. 2006); *Townsend* v. *Knowles*, 562 F.3d 1200 (9th Cir. 2009). Indeed, the reasons upon which the Ninth Circuit refuses to honor California "timeliness" rulings also has served to render unenforceable in federal court California's similar habeas corpus rules against successive petitions and habeas corpus as a substitute for direct

appeals. The Ninth Circuit has engaged in a wholesale campaign that has nullified any procedural-bar effect in federal court from state court findings that petitioners have unreasonably delayed the presentation of the federal claims in state court. Such a full scale eradication of the state's procedural timeliness rule is an affront to notions of federalism and comity. The Ninth Circuit should not be permitted to regularly undermine the state's important interests in the finality of its judgments. *Lambrix* v. *Singletary*, 520 U.S. 518, 525 (1997).

The Ninth Circuit's approach in any event conflicts with that of other circuits on the issue of the burden of proof. This case may well have been decided differently in either the Fourth or Fifth Circuits where the burden of establishing inadequacy is, at least, placed upon the petitioner rather than on the state. *See McNeill* v. *Polk*, 476 F.3d 206, 213 (4th Cir. 2007); *Stokes* v. *Anderson*, 123 F.3d 858, 860 (5th Cir. 1997). The Ninth Circuit has taken a position and promulgated a standard which is so strict that it cannot be defended.

Because the Ninth Circuit has nullified the effect of California's timeliness rule and other rules in the federal procedural default context, the state must engage in costly litigation of claims that should be barred. In the district court respondent proffered a survey of California Supreme Court decisions showing that in just under eleven months, the state high court invoked the *Clark* timeliness bar in 370 cases. App. 28-32 (F&Rs 8/6 p. 20). The added expense of litigating claims that should be barred in federal court is simply unjustifiable. One example can be found in *Jackson* v. *Calderon*, 211 F.3d 1148 (9th Cir. 2000). In that case, the Ninth Circuit rejected California's time bar and then concluded that the writ should be granted on the basis of penalty phase ineffective assistance of counsel. *Id.* at 1153-54, 1165-66. Thus, the state was put to an extremely costly potential retrial many years after the crime on a claim that should have been barred, not to mention the cost of the federal evidentiary hearing litigation itself. Another similar example

can be found in *Fields* v. *Calderon*, 125 F.3d 757, 760 (9th Cir. 1997). in which the Ninth Circuit rejected the state's procedural bar and forced the state to conduct an expensive evidentiary hearing and litigate claims that should have been barred for years in federal court. *Fields* v. *Woodford*, 309 F.3d 1095, 1106, amended 315 F.3d 1062 (9th Cir. 2002); *Fields* v. *Brown*, 431 F.3d 1186, 1190 (9th Cir. 2005).

The Ninth Circuit approach is wrong. Moreover, it inevitably leads to untenable second-guessing of the state courts on state-law questions.

It is most appropriate for federal courts to embrace an approach which treats as "adequate" a fair state-court procedural-bar judgment which is premised upon an established and reasonable procedural rule. "A State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." *Lambrix* v. *Singletary*, 520 U.S. at 525. "Procedural rules, like the substantive laws they implement, are the products of sovereignty and the democratice process." *Lee* v. *Kemna*, 534 U.S. 362, 394 (2002) (Kennedy, J., dissenting). "Most state procedures are supported by various legitimate interests, so established rules have been set aside only when they appeared to be calculated to discriminate against federal law, or as one treatise puts it, that they did not afford a reasonable opportunity to assert federal rights." *Id.* (citing VOL. 16B, FEDERAL PRACTICE & PROCEDURE 392 [§ 4027]).

Moreover, State courts are the final and authoritative determiners of state law. *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975). Thus, when a state court finds that a state procedural bar acts to create a forfeiture of a petitioner's federal issue, a federal court would be hard pressed to deny the validity of the ruling as a final determination of the state-law question. See *Estelle* v. *McGuire*, 502 U.S. 62, 67 (1991). Without specific proof by the petitioner, federal courts should never assume that state court's are not rigorously following their own rules or that

such a state-law decision was unconstitutional.[2] See *Johnson* v. *Zerbst*, 304 U.S. 458, 468-69 (1938). It would not make any sense for a federal court which is bound to accept a state procedural ruling as authoritative, presumptively constitutional, and correct to refuse to accept the ruling as the final word on the procedural issue. Without extraordinary circumstances, like unconstitutionality in the state court ruling, the federal court can safely conclude the adequacy inquiry by, at a minimum, validating a fair state procedural ruling which is premised upon a rule that affords the petitioner a reasonable opportunity to obtain a merits ruling upon his federal issue.

A policy of deferential treatment by federal courts toward state procedural bar rulings in criminal cases is further supported by the deferential way that federal courts treat procedural defaults in federal criminal cases. Federal courts of appeal regularly find a federal defendant's demonstrated failure to comply with established federal procedural rules, like the contemporaneous objection requirement, sufficient to stop review of a claim upon appeal. *See United States* v. *Olano*, 507 U.S. 725, 732 (1993). There is no fundamental difference between state-court procedural bars and those imposed by federal courts in federal criminal cases. Simply put, it offends principles of comity if federal

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[2] However, the Ninth Circuit is engaging in exactly this sort of second-guessing of California's interpretation of its own laws. The California Supreme Court has declared that the habeas corpus timeliness rules apply to *all* (both capital and non-capital) habeas litigants once the presumption of timeliness for capital litigants has past. *In re Clark*, 5 Cal. 4th at 783, 855 P.2d at 751. Yet, despite this declaration by the state of its interpretation of its own state laws, the Ninth Circuit has inappropriately declared that California capital cases provide no guidance upon the timeliness question in the non-capital context. *King* v. *LaMarque*, 464 F.3d at 966; *Townsend* v. *Knowles*, 562 F.3d at 1207-08. This sort of second-guessing of the state's interpretation of its own laws is forbidden. *Estelle* v. *McGuire*, 502 U.S. at 67

courts were to accord less respect to state-court procedural rulings than they do to their own. *Francis* v. *Henderson*, 425 U.S. 536, 541-42 (1976).

Here, California's habeas corpus timeliness rule provides fair notice and an opportunity to comply such that it is adequate to bar federal review, and any contrary decisions by the Ninth Circuit are indefensible. California describes its timeliness bar as follows:

> Pursuant to policies adopted by this court in June 1989, a habeas corpus petition is not entitled to a presumption of timeliness if it is filed more than 90 days after the final due date for the filing of appellant's reply brief on the direct appeal. In such a case, to avoid the bar of untimeliness with respect to each claim, the petitioner has the burden of establishing (i) absence of substantial delay, (ii) good cause for the delay, or (iii) that the claim falls within an exception to the bar of untimeliness.
>
> Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim. A petitioner must allege, with specificity, facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time. It is not sufficient simply to allege in general terms that the claim recently was discovered, to assert that second or successive postconviction counsel could not reasonably have discovered the information earlier, or to produce a declaration from present or former counsel to that general effect. A petitioner bears the burden of establishing, through his or

her specific allegations, which may be supported by any relevant exhibits, the absence of substantial delay.

A claim or a part thereof that is substantially delayed nevertheless will be considered on the merits if the petitioner can demonstrate good cause for the delay. Good cause for substantial delay may be established if, for example, the petitioner can demonstrate that because he or she was conducting an ongoing investigation into at least one potentially meritorious claim, the petitioner delayed presentation of one or more other known claims in order to avoid the piecemeal presentation of claims, but good cause is not established by prior counsel's asserted uncertainty about his or her duty to conduct a habeas corpus investigation and to file an appropriate habeas corpus petition.

A claim that is substantially delayed without good cause, and hence is untimely, nevertheless will be entertained on the merits if the petitioner demonstrates (i) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (ii) that the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (iii) that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death; or (iv) that the petitioner was convicted or sentenced under an invalid statute. When we apply the first three of these exceptions, we shall do so exclusively by reference to state law. When we apply the

> fourth exception, we apply federal law in resolving any federal constitutional claim.

In re Robbins, 18 Cal. 4th at 780-81, 959 P.2d at 317-18.

While the presumption of timeliness applies only to capital litigants, the rest of the policies apply in principle and in actuality to non-capital habeas litigants. The California Supreme Court has expressly stated as much:

> The [capital case] Policies [footnote 18 omitted] did not create or modify the timeliness requirements applicable to *all habeas corpus petitions* except insofar as they (1) establish a presumption of timeliness if a petition by a capital defendant is filed within 90 days of the final due date for the filing of an appellant's reply brief (Policies, std. 1-1.1); and (2) take into account this court's decision in *In re Stankewitz*, [] 40 Cal.3d 391 [(1985)], when evaluating the timeliness of a habeas corpus petition in a capital case (Policies, std. 1-1.3).

In re Clark, 5 Cal.4th at 783, 855 P.2d at 751, (emphasis added).

There is a similarity between California's timeliness rule, which measures "substantial delay" from the time the petitioner or counsel knew or reasonably should have known of the factual and legal bases of the claim, *In re Robbins*, 18 Cal. 4th at 780, 959 P.2d at 317, and the triggering date within the AEDPA statute of limitations: "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D).

A conclusion that procedural bars necessitating "reasonableness" or "promptness" and "diligence" from the petitioner when presenting claims in a timely manner as opposed to after "substantial delay" are "inadequate" is not mandated here. The American justice system employs

"reasonableness" standards through out its case and statutory law. As an example, citizens can be held liable in tort cases if they engage in "unreasonable" negligence or citizens can be found criminally responsible for violent conduct even if they honestly but "unreasonably" believe that they need to defend themselves. In another example, in California, a simple kidnapping can be elevated to aggravated kidnapping if the perpetrator "substantially" increases the risk of harm. *See People* v. *Nguyen*, 22 Cal. 4th 872, 885-86, 997 P.2d 493, 501 (2000). "Reasonableness" standards do not instantly become infirm when they are employed in a procedural rule as opposed to a substantive one.

Nor should "adequacy" depend upon the federal court's second-guessing of how the state court has exercised state-law "discretion" in other cases. This Court has never refused to uphold a state procedural-bar ruling as "inadequate" to stop review of a federal habeas corpus issue simply because of "discretionary," or "inconsistent," usage of the state's procedural rules by the state court. Nor does this Court's habeas corpus precedent mandate that the state must first carry a burden of showing "non-discretionary" or "consistent" usage of the bar in a sampling of other state cases before the bar can operate.

This Court did analyze evidence of the state court's general enforcement of a procedural bar in *Dugger* v. *Adams*, 489 U.S. 401, 410 n.6 (1989) and *Wainwright* v. *Sykes*, 433 U.S. 72, 85-86 (1977). Cf. *Johnson* v. *Mississippi*, 486 U.S. 578 (1988). [3] However, both cases upheld the state procedural rule at issue. *Sykes* only mentioned that the state courts applied the rule in other cases, and *Adams* merely

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[3] In any event, Johnson appeared in this Court on direct appeal from the state court, and the procedural rule used by the state in that case was new and contradicted the existing rule at the time of the purported default. As such, the rule would likely have been inadequate under the fair notice, fair opportunity to comply standard advanced here.

observed that the rule had been applied "in the vast majority of cases." *Adams* added that any contrary cases were insufficient to undermine the "adequacy" of the state-court decision.[4]

In addition, federal policy should not frown upon "discretion" or leniency in favor of mechanistic, rigid, and inflexible rules with "mandatory" operation when the states are enforcing or relaxing their procedural bars. Discretion, possible exceptions, and lenity based upon considerations of justice, are positive attributes that can avoid the potentially draconian effect of fixed rules. Alternatively, there is no basis in reason why a petitioner who is capable of following an established rule must know in advance the exact manner in which the state court's discretion might work or what excuses could abate the risk of forfeiture, when he has fair notice of the rule and decides not to comply.

Federal procedural requirements are tempered with judicial discretion. *See United States* v. *Olano*, 507 U.S. at 732 (involving judicial discretion to excuse a default based upon a failure to object pursuant to Fed. R. Civ. Pro. 52(b)); *United States* v. *Frady*, 456 U.S. 152, 162-63 (1982); *Davis* v. *United States*, 411 U.S. 233, 241 (1973). In *Granberry* v. *Greer*, 481 U.S. 129 (1987) and *Day* v. *McDonough*, 547 U.S. 198, 210-11 (2006), this Court decided not to mandate that federal courts address, on their own, procedural-bar and statute-of-limitation defenses if the state fails to assert them in a timely manner. However, the Court permitted the exercise of "discretion" to review those unraised defenses on a case-by-case basis. One should presume that the

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[4] In *Adams*, this Court noted that the Florida high court had routinely imposed forfeiture of late *Caldwell* v. *Mississippi* claims specifically. However, unlike what the Ninth Circuit has accomplished, namely the wholesale rejection of California's timeliness bar, this Court has never suggested that a state procedural bar could in some way become per se "inadequate" on a global scale for all federal claims for a never-ending period spanning decades.

state could not advance the argument that, as a result of this discretion, federal courts are now required to evaluate in every case, the state's unraised defenses.

In this same vein, AEDPA's statute of limitations starts to run when the factual predicate of the claim could have been discovered by the use of due diligence. 28 U.S.C. § 2244(d)(1)(D). Further, it has not always been clear when applying this Court's exceptions to the procedural default principle, exactly what circumstances amount to "cause," see *Reed* v. *Ross*, 468 U.S. 1, 13 (1984), or what boundaries define "prejudice," *see United States* v. *Frady*, 456 U.S. at 170. Petitioner is not aware of any federal authority that restricts the use of these federal procedural rules until the federal court can show that the rules are devoid of "discretion" and that it has "strictly" or regularly and consistently" applied such rules in the "vast majority" of other federal cases. Ironically, the Ninth Circuit has declared that it has the discretion to reject a barred habeas corpus issue on the merits when the procedural bar at issue seems complicated. *Franklin* v. *Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002). This is the same exercise of judicial discretion that the Ninth Circuit regards with undue suspicion when applied by a state court.

The California courts ought to be afforded the same type of discretion and lemency as the federal courts when the state courts rule that procedural bars either do or do not apply. California permits criminal defendants to raise collateral habeas corpus challenges to their convictions. These challenges must be brought to court "without substantial delay" from the time the defendant should have reasonably become aware of the bases for the challenge. Claims that are raised after substantial delay without justification are defaulted. Circumstances and case-by-case analyses necessarily guide the conclusion about when a claim was unreasonably delayed and what circumstances present an exception to the rule. See *In re Clark*, 5 Cal. 4th 750, 855 P.2d 729.

However, the mere exercise of "discretion" or occasional "inconsistency" in the application of a state's procedural rules which apply state law to case specific circumstances leads to no constitutional infirmity. *Engle* v. *Isaac*, 456 U.S. 107, 121 n. 21 (1982); *Beck* v. *Washington*, 369 U.S. 541, 554-55 (1962); *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948). When the petitioner is afforded fair notice of the rule and the danger that failure to comply risks forfeiture of his claims, along with a fair opportunity to follow the rule, state-court "discretion" and the periodic decision to relax the rules to promote justice and protect federal rights should not be discouraged.

Punishing the state's procedural laws because they are lenient or flexible is objectionable for other reasons as well. Such a system discourages flexible case-by-case factual considerations which might operate to excuse or alleviate the impact of a procedural violation. See, e.g., *Fearance* v. *Scott*, 56 F.3d 633, 642 (6th Cir. 1995) (state procedural default rule became "adequate" once state law eliminated judicial discretion to review "successive" habeas corpus petitions). This could lead to the undesirable consequence that the states would be motivated to enact fixed, mechanical, and rigid rules which starkly constrain the exercise of judicial discretion. Such rigid rules can have the potentially unfair result of barring federal claimants based upon mere technical violations. *Coleman* v. *Thompson*, 501 U.S. 722, 742-43 (1991) (claims barred because attorney filed appeal three days late).

Furthermore, there is no proper basis to think that state procedural rules that involve discretion could be directed at federal claims instead of state issues. Rather, state court's imposition of a procedural bar for a petitioner's federal claim would naturally bar related state law based claims. There is simply no showing that state procedural rules that incorporate some discretion operate to bar federal claims at a disparate rate than corresponding state claims.

An overly strict standard of adequacy which mandates rigid application or the federal court's

belief about consistency or regularity when the states are exercising discretion in imposing procedural bars leads to odd and excessive results. In addition, testing for regularity in the state's rulings on excuses and exceptions requires federal courts to delve deeply into questions of state law and procedure. *Prihoda* v. *McCaughtry*, 910 F.2d 1379, 1385 (7th Cir. 1990). Such a business is forbidden by federal habeas corpus courts. *Estelle* v. *McGuire*, 502 U.S. at 67.

This case presents important issues concerning state sovereignty and the finality and adequacy of state judgments which this Court has stated need to be clarified further. The doctrines of federalism and comity are violated by the second-guessing approach taken in the Ninth Circuit. This Court should grant certiorari to provide broad guidance upon the issues presented here.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: February 17, 2010

Respectfully submitted

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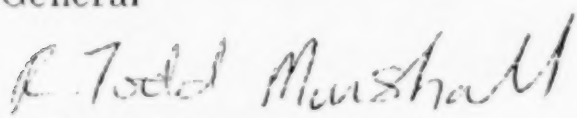

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OPPOSITION BRIEF

No. 09-996

IN THE SUPREME COURT OF THE UNITED STATES

JAMES WALKER, Warden, ET AL.,

Petitioner,

v.

CHARLES W. MARTIN

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSTION TO WRIT OF *CERTIORARI*

Questions Presented

Whether California's undefined standard of "substantial delay" - - used to evaluate the timeliness of a non-capital habeas corpus petition - - is so vague that it is inevitably applied in a fundamentally inconsistent manner and is therefore inadequate, within the meaning of this Court's procedural jurisprudence, to bar federal review; and whether the State should be required to prove that the standard is consistently applied?

LIST OF PARTIES

Petitioner, James Walker is a warden in the California Department of Corrections and is represented by R. Todd Marshall, Esq., Sate of California, Deputy Attorney General of Sacramento, California.

Respondent, Charles Martin, is represented by Michael B. Bigelow, Esq., of Sacramento, California.

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REASONS FOR DENYING THE WRIT

Respondent, Charles Martin, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the lower court's opinion in this case[1].

I PETITIONER OVERSTATES ITS CLAIM THAT THE NINTH CIRCUIT IS OBSESSED WITH CONSISTENCY, INVALIDATING ALL RULES IT DEEMS LACK CONSISTENCY, THEREBY "KILLING" CALIFORNIA'S TIMELINESS BAR

While most states have adopted determinate standards specifically identifying the time period within which petitions for habeas corpus must be file, California has a unique, singular set of guidelines regarding when petitions will be deemed untimely. *See, Carey v. Saffold,* 536 U.S. 214, 221-22 (2002). Unlike the majority of other states, California's timeliness rule is indeterminate, relying instead on a general standard requiring the filing of post conviction claims be accomplished without, "undue" or "substantial delay." Thus, while California's procedural timeliness bar may seem typical, it is in fact quite atypical, and

[1] Respondent has no objection to Petitioner's jurisdictional statement or statement of the case.

for that reason this case is a poor vehicle for guidance.

Although petitioner, and amicus, contend the Ninth Circuit's decisions are driven by antipathy for exercised discretion and surfeit flexibility, a closer reading of those relevant decisions prove the contrary. It is not the exercise of discretion, or the fact there is built into California's standard a degree of suppleness that compels a finding of inadequacy; rather, it is that standards California applies when it imposes its timeliness bar are, in the words of at least one justice of the California Supreme Court, "impossibility amorphous" and "nebulous as well as riddled with exceptions and requiring fact-specific analysis." *See, In re Gallego*, 18 Cal.4th 825, 845 (1998), (Brown, J., concurring in part and dissenting in part). And, in the words of another Justice, the rule is, "indeterminate at [its] very core," the result of which is that, "its application to any given claim may yield varying results, as reasonable persons differ

as to whether the claim in question has been presented without 'substantial delay' and, if not, whether 'good cause' exists for any such delay." *In re Robbins* 18 Cal.4th 770, 817 fn.3 (1998) fn.3 (Mosk, J, concurring).

Compounding the problem is the fact that California denies more than the vast majority of habeas petitions without explanation or comment. Some petitions are denied with only a citation to *In re Clark* and/or *In re Robbins*[2], the Court's indication that the petition is procedurally barred as untimely. The vast majority of other habeas petitions, however, are denied without reference to the State's timeliness bar, and of those denials, a significantly large number are completely silent, denied by the Court without hint of citation, *raison d'être* or opinion, permitting only of raw speculation as to whether the denial might be merits based, or procedurally defaulted.

So, not only is the California rule vague and internally standardless, requiring "diligence" but

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[2] *In re Clark*, 5 Cal.4th 750, (1993); *In re Robbins* 18 Cal.4th 770, (1998).

nowhere defining the concept; frowning upon, "undue delay" but nowhere defining that thought either, no rule of court or authoritative holding tells non-capital petitioners when a habeas petition will be considered presumptively timely, and when it risks dismissal on timeliness grounds. Thus, the rule is facially and fundamentally inadequate.

Nor is the State's argument bolstered by its habitual practice of issuing truly silent denials, those without reference to citation or suggestion of rationale, since it is impossible to tell from them the basis for, or the parameters of its denial. Even those denials which reference *Clark/Robbins* do nothing to help clarify the standard, or evidence its consistent application, since even from them the State is incapable of establishing any degree of sameness.

The determination of whether a state court's decision rests on independent and adequate state grounds is placed squarely on the federal court's shoulders, *see Coleman v Thompson*, 501 U.S. 722, 736,

(1991); *Abie State Bank v. Bryan*, 282 U.S. 765, 773, (1931). And since a timeliness rule which is standardless, both substantively and as to duration, fails to provide petitioners with adequate notice of the circumstances that will bar their claims, the Court of Appeals would have been remiss had it not decided as it did.

Nor is it quite correct that the Ninth Circuit is regularly in the habit of annulling rules predicated on the application of judicial discretion. *Wood v. Hall*, 130 F.3d 373, 376 (9th Cir. 1997)(defining adequacy, and noting that a rule is not rendered inadequate simply because the application of the rule requires the exercise of judicial discretion). Judicial discretion is a powerful thing. Discretion is the ability to choose. "To say that a court has discretion in a given area of law is to say that it is not bound to decide the question one way rather than another." *Pullman v Swint*, 456 U.S. 273, (1982). However, "Judicial decisions are reasoned decisions. Confidence in a

judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust." *See Rita v. United States*, 551 U.S. 338, 127 S.Ct. 2456, 2468 (2007). Moreover, as long as a court exercises its discretion fairly and impartially, a reviewing court will not reverse unless it finds that the ruling constitutes an abuse of discretion. *See, United States v Novak*, 918 F.2d 107 (10th Cir. 1990).

But, when California's timeliness rule leads to arbitrary decisions, as the Magistrate Judge below concluded it might, Appendix to Petition for Writ of Certiorari at pg 14, one is not filled with great confidence that this is the right vehicle to provide broad guidance with respect to the adequate state ground doctrine.

II WITH RESPECT TO PETITIONER'S ASSERTION THAT NATIONAL UNIFORMITY IS ESSENTIAL AS TO WHOSE BURDEN OF PROOF IT IS TO ESTABLISH ADEQUACY - IT IS NOT

Finally, the State argues that the Ninth Circuit's burden shifting requirement is too great a task to be borne by the State; that the result would have been different in other Circuits. Pet. Appendix at pg. 14.

The ultimate question, however, is whether a particular State's procedural bar is adequate. It is a question which remains the same, irrespective of who bears the ultimate burden of proof. Thus, the fact one or more circuits take a different approach toward the ascertainment of that ultimate fact does not require national uniformity, and does not justify a place on the Court's docket.

CONCLUSION

For all of the foregoing reasons, the Court should deny the petition for a writ of certiorari.

DATED: May 17, 2010

Respectfully submitted,

_____

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Counsel of Record
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Charles Martin

REPLY BRIEF

COPY

SUPREME COURT, U.S.
FILED
MAY 27 2010
OFFICE OF THE CLERK

No. 09-996

In the Supreme Court of the United States

JAMES WALKER, WARDEN, ET AL., *Petitioner,*

v.

CHARLES W. MARTIN, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Under state law in California, a prisoner may be barred from collaterally attacking his conviction when the prisoner "substantially delayed" filing his habeas petition.

In federal habeas corpus proceedings, is such a state law "inadequate" to support a procedural bar because (1) the federal court believes that the rule is vague and (2) the state failed to prove that its courts "consistently" exercised their discretion when applying the rule in other cases?

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As explained in the certiorari petition, the "adequacy" of state-law procedural-default rulings to bar claims in federal habeas corpus proceedings is an important question affecting state sovereignty and the finality of state judgments. See Sup. Ct. R. 10(a). And, as this Court recently observed in *Beard* v. *Kindler*, 130 S.Ct. 612, 619 (2009), there is a need to further clarify the rules governing "adequacy." This case represents a proper and timely vehicle for answering questions left pending after *Kindler*.

1. Respondent Martin, as does the Ninth Circuit, purports to acknowledge that state procedural-default rulings may be "adequate" even where the underlying state rule is discretionary and depends on "reasonable" conduct by the litigant. (Opp. 3; *Wood v. Hall*, 130 F.3d 373, 376 (9th Cir. 1997)). Yet, similar to the Ninth Circuit, Martin in the end would give such rulings no effect precisely because the state court's fact-bound exercises of discretion inevitably result in more real or perceived variance in application than would result from rigid or mechanical bright-line rules. This Court's recognition in *Kindler* of the legitimacy of discretion-based rules, however, necessarily leads to the conclusion that federal courts should not second-guess the case-specific applications of the state's discretionary procedural rulings. If discretionary rules are valid, their inevitable results must be valid too. Martin's and the Ninth Circuit's view, if accepted, ultimately would nullify *Kindler*'s endorsement of discretionary state decisions.

That result is demonstrable and illustrates the need for this Court's intervention. By second-guessing the state procedural decisions that involve discretionary judgments, the Ninth Circuit has nullified the entire effect of California's habeas corpus timeliness bar. See *Morales* v. *Calderon*, 85 F.3d 1387 (9th Cir. 1996); *Bennett* v. *Mueller*, 322 F.3d 573 (9th Cir. 2003); *King* v. *LaMarque*, 464 F.3d 963 (9th Cir. 2006); *Townsend* v. *Knowles*, 562 F.3d

1200 (9th Cir. 2009).[1] For the same reasons, the Ninth Circuit has also nullified enforcement in federal court of other California habeas corpus rules, such as the rule barring successive petitions and the rule against using habeas corpus as a substitute for direct appeals. See *Cooper* v. *Calderon*, 255 F.3d 1104, 1111 (9th Cir. 2001); *Fields* v. *Calderon*, 125 F.3d 757, 765 (9th Cir. 1997). Martin has not provided any citation to Ninth Circuit authority which shows any softening of this refusal to honor the state's procedural rules.

Further, as suggested in Justice Kennedy's concurring opinion in *Kindler*, if a state procedural rule must be fixed in all of its particulars before it might be honored in federal court, the state courts would be deprived of the same case-law decisional methodology appropriately relied upon by the federal bench. Moreover, alleged or perceived variation in results on account of judicial discretion can hardly prejudice an individual litigant, for it is that very discretion which may allow him to avoid what might otherwise be seen as a harsh result required by a rigid rule. And the "cause and prejudice" safety valve guards against miscarriages of justice in any event.

2. Martin argues that California's timeliness rule is atypical because it is discretionary rather than fixed. Opp. 2-3. However, although many states have fixed deadlines for the filing of collateral habeas corpus challenges, nearly all of these states have discretionary exceptions to their rules. Just because California chooses to exercise its discretion on one side of the line, while the other states exercise their discretion on the other side of the line, does not make the fundamental nature of the exercise of that discretion different at all. Since the majority of states have discretion built into their timeliness

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[1] Now that the Ninth Circuit has in place several published opinions which have in effect killed California's habeas corpus timeliness bar, further published opinions are unlikely. This explains why the Ninth Circuit used a memorandum opinion to reject California's time bar here.

analyzes[2], this case is particularly appropriate to

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[2] See, e.g., Ala. Crim. Pro. R. 32, 35 ("good cause" and "diligence" standards for second-appeal and successive petitions); Colo. R. Crim. Pro. 35(c)(2) ("interest of justice"); *People* v. *Scheer*, 184 Colo. 15, 20, 518 P.2d 833, 835 (1974) ("special circumstances" excusing successive petition); Colo. Rev. Stats. Ann. § 16-5-402(1) ("justifiable excuse" or "excusable neglect" for statute-of-limitations violation); Conn. Practice Book § 23-29(3) (successive-petition bar inapplicable for claim not "reasonably available" earlier); Del. Superior Ct. Crim R. 61(i)(2, 5) ("cause and prejudice" and "fundamental miscarriage of justice" exceptions to successive-petition bar); Fla. R. Crim. Pro. 3.850(b) (limitations-period bar excused for claim undiscovered despite "diligence"); Ga. Stats. § 9-14-47.1 (successive-petition bar lifted if facts could not "reasonably" have been asserted in first petition); Hawaii Penal R. 40(a) ("extraordinary circumstances" for second petition); Idaho Code §§ 19-4901(b), 19-4908 ("reliability" and "diligence" components of exception to no-second-appeal rule; "insufficient reason" precludes successive petition); 725 Ill. L. C. S. § 5/122-1 ("no culpable negligence" and "fundamental fairness" exceptions to statue-of-limitations and successive-petition rules); Indiana Post-Conviction R. PC 1(8) ("sufficient reason" for second petition); Iowa Code Ann. § 822.8 ("sufficient reason" exception for successive petition); Kan. Stats. Ann. § 60-1507(c) (court not "required" to consider successive petition); Ky. R. Crim. Pro. 11.42(10) (limitations-period bar lifted for facts defendant could not "reasonably" have known); La. Crim. Pro. Code, Art. 930.4 ("interests of justice" exception to no-second-appeal rule; "inexcusably omitted" standard for successive petitions); 15 Me. Rev. Stats. Ann. § 2128 (no second appeal unless "excusable"); Md. Code Crim. Pro. 7-103, 7-104 ("interest of justice" exception to successive-petition rule; "extraordinary cause" exception for statute of limitations), Mass. R. Crim. Pro. 30(c)(2) (judicial "discretion" to allow successive petition); *Spears* v. *State*, 725 N.W.2d 696, 700 (Minn. 2006) (limited-situation "fairness" exception for successive-petition and second-appeal procedural-bars if default was not deliberate and "inexcusable."); Miss. Stats. § 99-39-21 ("cause and prejudice" requirement for second appeal); Mont. Code Ann. § 46-21-105 (no successive petition unless claims "could not reasonably have been raised" in first petition); Nev. Rev. Stats. § 34.724 (statute-of-limitations bar lifted where delay not defendant's "fault"); N.J. R. of Ct. 3:22-4 (successive-petition and second-appeal

(continued. .)

afford needed guidance with respect to honoring the procedural rules of many states.

Next, Martin posits that "unexplained" denials of habeas corpus petitions by California courts create uncertainty about whether the ruling is based on the merits or on procedural default. Opp. 4. But California courts and the Ninth Circuit have made it clear that such an unexplained denial is an adjudication on the merits and that no procedural bar was contemplated. See, *Griffey v. Lindsey*, 345 F.3d 1058, 1066, vacated as moot, 349 F.3d 1157 (9th Cir. 2003); *Visciotti v. Woodford*, 288 F.3d 1097, 1104-05 (9th Cir.), rev'd on other grounds, 537 U.S. 19 (2002); *Hunter v. Aispuro*, 982 F.2d 344, 347-48 (9th Cir. 1992); *Harris v. Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc); see *In re Robbins*, 18 Cal.4th 770, 814, n. 34 (1998); *People v. Duvall*, 9 Cal.4th 464, 475 (1995); *People v. Romero*, 8 Cal.4th 728, 737-38 (1994); *In re Clark*, 5 Cal.4th 750, 768-70 (1993).

Conversely—and somewhat inconsistently—Martin complains that state courts often deny petitions with only a citation to *Robbins* or to *Clark*. Opp. 4. But the California Supreme Court has explained that such citations mean that the petition is being rejected on the grounds that it is untimely. *Robbins*, 18 Cal.4th at 814, n. 34. The state court should not have to issue any further clarification. Given the shear volume of habeas corpus petitions addressed yearly in California [3], it would waste

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(.. continued)
bars lifted for "fundamental injustice"); N.Y. Crim. Pro. L. § 440.10(c) ("interest of justice" discretion to lift successive-petition bar); Vt. Stats. Ann. § 7134 (court "not required to entertain successive petitions"); Wisc. Stats. § 974.06(4) (no successive post-conviction motions unless "sufficient reason" shown); Wash. Rev. Code § 10.73.140 (successive petitions barred unless "good cause" shown why not raised earlier"); see also Ohio Rev. Code § 2953.23.

[3] State courts in California dispose of nearly 20,000 criminal habeas corpus petitions each year. 2009 COURT STATISTICS REPORT, STATEWIDE CASELOAD TRENDS. (continued...)

precious judicial resources if the State were required to offer a fully explicated opinion on every one.

Martin suggests that his view of the law does not offend comity because, he suggests, the federal court should not ignore a state procedural ruling unless it constitutes an abuse of discretion. Opp. 7. But federal review of abuse-of-discretion questions necessarily entangles the federal court in untenable—and, as illustrated in this case, wasteful—second-guessing of state-law decisions on matters of state law. In any event, the Ninth Circuit's approach in actual effect presumptively treats the California courts, without supporting evidence, as if they had abused their discretion or exercised it unfairly.

3. In this case, Martin was on fair notice of the requirement that he bring his habeas corpus claims to the state high court without substantial unexplained delay. And he was provided with a fair opportunity to bring all of his claims during his first state habeas petition. But he provided no proper justification for why he waited years to advance claims that had been knowable at the time of his trial and direct appeal. It hardly could be unconstitutionally arbitrary for the state court to have deemed his unreasonably-delayed claims to have been defaulted. So there is no good reason for the federal court to dishonor the state procedural ruling.

If there ever might have been a time for especially critical skepticism of state-court discretionary procedural rules and rulings, that time has long passed. The Ninth Circuit's wholesale attack upon California's timeliness bar, and other California appellate and habeas corpus rules, is at odds with modern concepts of federalism and comity recognized by this Court. The Ninth Circuit's refusal to honor the state's timeliness rule should be rejected

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(...continued)
See http://www.courtinfo.ca.gov/reference/documents/csr2009.pdf.

in favor of supporting the state's legitimate interest in the finality of its judgments.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: May 27, 2010

Respectfully submitted

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 09-996

IN THE

Supreme Court of the United States

JAMES WALKER, Warden, *et al.*,
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CHARLES W. MARTIN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under state law in California, a prisoner may be barred from collaterally attacking his conviction when the prisoner "substantially delayed" filing his habeas petition. In federal habeas corpus proceedings, is such a state law "inadequate" to support a procedural bar because (1) the federal court believes that the rule is vague and (2) the state failed to prove that its courts "consistently" exercised their discretion when applying the rule in other cases?

2. Should the varying rubrics used to express when a state procedural default rule is adequate be replaced with a single standard of fair notice of the rule and reasonable opportunity to make the claim?

3. On habeas corpus, as distinguished from direct review, does the adequacy inquiry provide sufficient marginal benefit to justify its litigation cost, or should it be abandoned altogether, recognizing that the cause-and-prejudice exception covers the relevant policy considerations?

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IN THE

Supreme Court of the United States

JAMES WALKER, Warden, *et al.*,
Petitioners,

vs.

CHARLES W. MARTIN,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

The Court of Appeals for the Ninth Circuit has adopted an extreme approach to determining the "adequacy" of state rules for the purpose of the procedural default doctrine. Even though the California Supreme Court clarified and explained the state timeliness rule 17 years ago, the Ninth Circuit has declared it inadequate on the ground that the state has not proved it is applied with the degree of uniformity that the Ninth Circuit deems necessary. That degree would serve no valid purpose and would ultimately be detrimental to criminal defendants.

The delay and expense that come from needless litigation of the "adequacy" issue and from needless litigation of defaulted claims are contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On December 7, 1986, children playing along the banks of the Sacramento River discovered the body of Charles Stapleton. *People* v. *Martin*, No. C022364 (Cal. App. 1997), p. 2 (unpublished).[2] He had been stabbed eight times in the neck, back, and throat. *Ibid.* His skull was fractured. *Ibid.* In the same area, the children also found the wallet of Charles W. Martin. Respondent's Motion for Summary Dismissal in *Martin* v. *Hubbard*, No. Civ. S-99-0223 (ED Cal., Nov. 8, 2007), p. 10 ("MSD").[3]

Three days later, during a taped interview with police, Martin's girlfriend, Bonnie Permenter, made

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2. Available at http://www.cjlf.org/files/MartinCalApp1997.pdf.

3. Available at http://www.cjlf.org/files/MartinMotionSumDiss.pdf.

statements that incriminated Martin. *People* v. *Martin*, *supra*, at 2. Martin disappeared. *Id.*, at 3.

Martin was arrested in Florida eight years later. *Ibid.* A jury convicted him of first-degree murder and robbery in 1995. *Id.*, at 1. He was sentenced to life without the possibility of parole. MSD 2.

Martin appealed to the California Court of Appeal raising only a state-law hearsay claim. That court affirmed. See *People* v. *Martin*, *supra*, at 9. Martin filed a petition for discretionary review with the California Supreme Court, also raising the same claim. See Magistrate Judge's Findings and Recommendations (ED Cal., Feb. 1, 2001), p. 3 ("MJFR").[4] That court denied review. *People* v. *Martin*, No. S059580 (Cal., Apr. 16, 1997) (unpublished); MSD 3. The case was final on direct review for the purpose of federal habeas law on July 15, 1997.

Seven months later, Martin filed a habeas corpus petition in the state Superior Court. See MSD 3. This petition contained an ineffective assistance claim, along with claims regarding the jury pool and jury instructions. See *ibid.* When this petition was denied, Martin filed a similar petition in the Court of Appeal.[5] After denial of this petition, Martin filed a petition in the California Supreme Court, which was denied January 27, 1999. See MSD 4.

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4. Available at http://www.cjlf.org/files/MartinFindings010201.pdf.

5. In California, there is no appeal from denial of a habeas petition, and review is accomplished with a successive petition to a higher court. See *Carey* v. *Saffold*, 536 U. S. 214, 221 (2002). This was once common practice throughout the United States, although it is now unusual. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Carey* v. *Saffold*, No. 01-301, pp. 11-12, http://www.cjlf.org/pdf/Saffold.pdf.

Martin then filed a habeas corpus petition in federal court. See MSD 4. In 2001, the Magistrate Judge found that the ineffective assistance allegations of the second amended petition were sufficiently different from those filed in state court to constitute a new and unexhausted claim, and that a sufficiency of the evidence claim was also unexhausted. See MJFR 3-6.[6] This holding was followed by an amended petition of exhausted claims only and an abeyance order to allow petitioner to return to state court to exhaust, entered on July 9, 2001. See App. to Pet. for Cert. 33-34.

On March 18, 2002, nearly *five years* after the case was final on direct review, Martin filed a new state habeas petition in the California Supreme Court. This petition raised, for the first time in state court, the allegations that are the subject of the present petition. On September 11, 2002, the court denied this petition with citations to its precedents on untimeliness of habeas petitions, *In re Clark*, 5 Cal. 4th 750 (1993) and *In re Robbins*, 18 Cal. 4th 770, 780 (1998). App. to Pet. for Cert. 60.

Upon return to federal court, these claims were dismissed as procedurally defaulted. The Magistrate Judge found that the state procedural default rule was adequate, and the petitioner did not claim that the cause-and-prejudice or actual-innocence exceptions applied. See App. to Pet. for Cert. 54-57. The District Court adopted the Magistrate Judge's findings. On the question of procedural default, the District Court

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6. Whether different alleged shortcomings of counsel are separate claims or one claim is an unresolved question. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Bell* v. *Kelly*, No. 07-1223, pp. 13-23, http://www.cjlf.org/briefs/BellE.pdf. Because the holding that they were different claims was not disputed in the Court of Appeals, we will assume it to be correct for the purpose of this case.

declined to "do as petitioner urges and interpret *Bennett* v. *Mueller*[7] to require respondents to sort through thousands of noncapital habeas petitions to prove a negative where petitioner has failed to point to any specific cases wherein the rule was inconsistently applied." App. to Pet. for Cert. 27.

The Court of Appeals for the Ninth Circuit reversed based on another case decided the same day, *King* v. *LaMarque*, 464 F. 3d 963 (CA9 2006). App. to Pet. for Cert. 21. "On remand, in order to be able to maintain its affirmative defense of procedural default, the government must show that cases after *In re Clark*, 855 P. 2d 729 (Cal. 1993), had sufficiently clarified the rule and that it had been consistently applied." *Ibid.*

On remand, the Magistrate Judge found that the state had indeed met its burden, App. to Pet. for Cert. 6-19, and the District Court adopted the findings and dismissed the action. App. to Pet. for Cert. 4-5. The Court of Appeals reversed again, based on its recent decision in *Townsend* v. *Knowles*, 562 F. 3d 1200, 1207 (CA9 2009). App. to Pet. for Cert. 1-3. Because California has chosen to use a general standard of "substantial delay" rather than a rigid cutoff, and because that standard has not been "firmly defined" (*i.e.*, made rigid) through case law, the state rule is deemed "inadequate." See App. to Pet. for Cert. 3.

The warden's petition for certiorari was docketed in this Court on February 23, 2010.

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7. 322 F. 3d 573 (CA9 2003).

SUMMARY OF ARGUMENT

California's timeliness requirement was declared "inadequate" in this case because it is an open-ended rule rather than a rigid statute of limitations. Yet the federal rule was similarly open-ended before 1996, and such flexibility may be better for criminal defendants. Insisting that states go to rigid cut-offs before their rules are considered "adequate" serves no federal policy.

Indeed, the Ninth Circuit's obsession with consistency, achievable only through rigidity, creates a perverse incentive. This Court recognized the illogic of such a rule in the discretionary/mandatory context in *Beard* v. *Kindler*. The same reasoning applies for time limitations, and other kinds of rules as well. The time is long overdue for placing the entire "adequate state ground" inquiry under a single standard of fair notice and reasonable opportunity.

For habeas, as distinguished from direct review, there is no need for a separate adequacy inquiry at all. The "cause and prejudice" and "miscarriage of justice" exceptions cover the ground of when federal policy favors reaching the merits despite a default. The separate adequacy inquiry provides little or no marginal benefit and comes at a high cost of needless litigation.

ARGUMENT

I. The present confused state of procedural default law causes state rules to be declared "inadequate" without any basis in federal policy.

"[I]t would seem particularly strange to disregard state procedural rules that are substantially similar to those to which we give full force in our own courts."

Beard v. *Kindler*, 558 U. S. __, 130 S. Ct. 612, 618, 175 L. Ed. 2d 417, 425 (2009). For 20 years, federal courts had rules of court providing for dismissal of delayed petitions under certain conditions with no precise definition of what constituted a delayed petition. See 28 U. S. C. § 2254, former Rule 9(a) (1994 ed.) (state prisoner cases); 28 U. S. C. § 2255, former Rule 9(a) (1994 ed.) (federal prisoner cases). Despite the lack of a bright line, it was apparent under the former rule that a petition delayed for a time comparable to the present case was a delayed petition. See *Lonchar* v. *Thomas*, 517 U. S. 314, 317-318 (1996) (seven years from completion of direct review to first federal habeas, during two of which Lonchar's state habeas was pending); *id.*, at 326-327 (noting petition was a "delayed petition" and the question was the existence of prejudice).

When Congress supplanted the open-ended delay rule with a fixed statute of limitations,[8] the change produced much wailing from commentators sympathetic to habeas petitioners. See, *e.g.*, Sessions, Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners, 70 S. Cal. L. Rev. 1513, 1568 (1997). While many states followed Congress's lead, see, *e.g.*, Mont. Code § 46-21-102, California has stayed with the pre-AEDPA model. This is the kind of policy choice that states should be permitted to make in a federal system. Yet the lack of a precise definition of "substantial delays" renders the California rule "inadequate" in the Ninth Circuit's view. See *Townsend* v. *Knowles*, 562 F. 3d 1200, 1208 (CA9 2009).

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8. This change was made, among many others in habeas law, by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Title I, 110 Stat. 1214, 1217-1221.

What legitimate federal policy is served by declaring a state rule to be "inadequate" merely because the state has chosen to make the same policy choice that the federal courts followed for decades? The legitimate reasons for declaring a state rule to be inadequate are to prevent a state from changing the rules without adequate notice so as to trap litigants who "have in good faith complied with existing state procedural law" and to prevent a state from imposing "novel procedural requirements . . . for the purpose of evading compliance with a federal standard." *Kindler*, 130 S. Ct., at 619, 175 L. Ed. 2d, at 426 (Kennedy, J., concurring). No trap or evasion even arguably occurred in the present case.

The Ninth Circuit's insistence that the state must nail down its rules in detail so that they are "certain," see *Knowles*, 562 F. 3d, at 1207, seems to spring from a desire "to peer majestically over the [state] court's shoulder so that [they] might second-guess its" application of its own rules. Cf. *Lewis* v. *Jeffers*, 497 U. S. 764, 780-781 (1990) (quoting *Godfrey* v. *Georgia*, 446 U. S. 420, 450 (1980) (White, J., dissenting)). In the absence of a procedural trap, an evasion of federal law, or at least probable cause to suspect either of these, there is simply no policy justification for such intense federal court scrutiny of state procedures.

The Ninth Circuit's hypersuspicion of state procedural holdings contrasts sharply with the holding of this Court in a closely related context in *Carey* v. *Saffold*, 536 U. S. 214 (2002). For the purpose of implementing the federal statute of limitation's tolling provision, this Court directed that the state court's decision regarding whether a petition was timely filed should be accepted as conclusive without further inquiry. "If the California Supreme Court had clearly ruled that Saffold's 4½-month delay was 'unreasonable,' *that would be the*

end of the matter, regardless of whether it also addressed the merits of the claim, or whether its timeliness ruling was 'entangled' with the merits." *Id.*, at 226 (emphasis added). There was a time when suspicion was justified that state courts were misusing procedural rules to evade federal law and deny civil rights. See Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Philip Morris USA* v. *Williams*, No. 07-1216, pp. 8-13, http://www.cjlf.org/briefs/PhilipMorris.pdf ("CJLF *Philip Morris* Brief"). As *Saffold* implies, that time is long past. See also *Stone* v. *Powell*, 428 U. S. 465, 493-494, n. 35 (1976). A state court's decision to enforce a procedural default rule, find it inapplicable, or find good cause to waive it should be presumed to be in good faith in the absence of solid evidence to the contrary. The mere fact that the state rules have not been specified with such mechanical rigidity as to predetermine the outcome in every case is not sufficient to declare the rule inadequate.

This Court's jurisprudence of "adequate state grounds" has been plagued by imprecise language, as many commentators have noted over many years. See, *e.g.*, R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 557 (5th ed. 2003); Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 944 (1965); see also CJLF *Philip Morris* Brief 8-13. That imprecise language is responsible in part for the hostility to state rules of procedure that we see in too many federal habeas decisions.

Kindler took a step in the right direction, effectively disapproving problematic and unnecessary language in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969). See 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4026, pp. 385-386 (2d ed. 1996) (critique of *Sullivan*). However, the step was

small and the holding narrow. See *Kindler*, 130 S. Ct., at 619, 175 L. Ed. 2d, at 425. A larger step is sorely needed. The standard for deciding when a state ground is "inadequate" needs to be tailored to better fit the policies underlying the doctrine.

II. An obsession with consistent application creates a perverse incentive for states to enact rigid, harsh rules to the detriment of criminal defendants.

In rejecting the notion that discretionary procedural default rules are "inadequate," *Kindler* noted the perverse incentives that such a doctrine would create.

> "We are told that, if forced to choose, many States would opt for mandatory rules to avoid the high costs that come with plenary federal review. See, *e.g.*, Brief for State of California et al. as *Amici Curiae* 19; Brief for Criminal Justice Legal Foundation as *Amicus Curiae* 14. That would be unfortunate in many cases, as discretionary rules are often desirable. In some circumstances, for example, the factors facing trial courts 'are so numerous, variable and subtle that the fashioning of rigid rules would be more likely to impair [the trial judge's] ability to deal fairly with a particular problem than to lead to a just result.' *United States* v. *McCoy*, 517 F. 2d 41, 44 (CA7) (Stevens, J.), cert. denied, 423 U. S. 895 (1975); see also Friendly, Indiscretion About Discretion, 31 Emory L. J. 747, 760–761 (1982). The result would be particularly unfortunate for criminal defendants, who would lose the opportunity to argue that a procedural default should be excused through the exercise of judicial discretion. See *Henry* v. *Mississippi*, 379 U. S. 443, 463, n. 3 (1965) (Harlan, J., dissenting) ('If, in order to insulate its

> decisions from reversal by this Court, a state court must strip itself of the discretionary power to differentiate between different sets of circumstances, the [adequate state ground] rule operates in a most perverse way')." 558 U. S. __, 130 S. Ct., at 618, 175 L. Ed. 2d, at 424 (slip op., at 7-8).

The same principle applies to fixed versus open-ended time limitations. In holding that California decisions applying the timeliness rule "do not form a coherent pattern of consistent application," App. to Pet. for Cert. 3, the Court of Appeals cited two unpublished intermediate appellate court decisions. "*Compare, e.g., In re Little*, No. D047468, 2008 WL 142832 (Cal. Ct. App. Jan. 16, 2008) (fourteen months not an unreasonable delay), *with People v. Fairbanks*, No. C047810, 2006 WL 950267 (Cal. Ct. App. Apr. 11, 2006) (one year delay substantial and untimely)." *Ibid.* Very well, we will compare them.

Little does *not* hold that 14 months is *per se* a reasonable delay. It holds, in footnote 6, "*In the circumstances of this case,* we conclude Little did not unreasonably delay . . . ." (Emphasis added). The court does not elaborate on what circumstances led it to that conclusion. In an unpublished decision that resolves this procedural point in favor of the petitioner but ultimately denies the petition on the merits, it is understandable that the court did not expend limited resources to belabor the point. In *Fairbanks*, on the other hand, the court notes, while holding that one year was an excessive delay, that the petitioner had made no showing whatever of any cause for the delay. *Fairbanks*, *supra*, Part I, last para. Despite the default, the court went on to alternatively reject the claim on the merits. *Id.*, at Parts II, III.

These cases do not show courts setting traps for unwary petitioners, discriminating against the assertion of federal rights, or even arbitrarily switching default rules on and off. These are two cases close to the borderline of what would be considered an excessive delay. Cf. 28 U. S. C. § 2255(f) (one year). A flexible standard allowed one of the courts to make a more generous allowance in circumstances it thought warranted an extension, while the other did not do so where it found no such circumstances. The decisions may also have been affected by the magnitude of the consequences at stake. Little was sentenced to life in prison, while Fairbanks had lost her driving privileges.

If the state must replace this flexible standard with a fixed one in order to have it respected in federal court, what would that standard be? It would likely be a rigid rule of one year or less, perhaps much less. See, *e.g.*, Ariz. Rev. Stat. § 13-4234(C), (G) (150 days from judgment or 90 days from affirmance in noncapital cases; limit is jurisdictional); Va. Code § 8.01-654.1 (60 days from denial of certiorari or 120 days from appointment of counsel in capital cases). No federal policy supports giving states an incentive to adopt such rigid rules. On the contrary, it is better to encourage states to have flexible procedures that can take individual differences into account, so that state courts can review the merits first when it is appropriate to do so, and federal habeas can be reserved for its "secondary and limited" role. See *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983).

The same principle applies to other default rules, including successive petition limitations and limits on claims which were or could have been raised on direct appeal. Across the board, the varying rubrics for what is an adequate state ground should be abandoned and replaced with a single standard: fair notice and a

reasonable opportunity. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Beard* v. *Kindler*, No. 08-992, pp. 6-29, http://www.cjlf.org/briefs/Kindler.pdf.

III. Given the *Sykes* and *Carrier* exceptions to the procedural default rule, the entire "adequacy" inquiry is unnecessary on habeas and a source of unjustified expense and delay.

This Court has implied that there is doubt whether the "independent" prong of the "adequate and independent state ground" rule applies to habeas at all. See *Coleman* v. *Thompson*, 501 U. S. 722, 741 (1991); see also *Stewart* v. *Smith*, 536 U. S. 856, 860 (2002) (*per curiam*). In light of the development of the "cause and prejudice" and "actual innocence" exceptions to the procedural default rule, it is worth asking whether the "adequacy" prong provides a sufficient marginal benefit to justify its cost.

The doctrine that a state procedural rule must be "independent of the federal question and adequate to support the judgment" in order to preclude federal review, *Coleman*, 501 U. S., at 729, developed in cases coming to this Court on direct review of state decisions, and it was fleshed out to its present form during the civil rights struggle of the 1950s and 1960s. The history is traced in Glennon, The Jurisdictional Legacy of the Civil Rights Movement, 61 Tenn. L. Rev. 869, 885-900 (1994). In this context the limitation is jurisdictional, see *Coleman*, *supra*, at 729, and the Court has no authority to devise exceptions on grounds of policy.

Habeas is different. The rule is not jurisdictional. See *Dretke* v. *Haley*, 541 U. S. 386, 392-393 (2004). Also, the procedural default rule in habeas serves the

additional purpose of preventing evasion of the exhaustion rule. See *id.*, at 392 ("corollary"); *Coleman*, 501 U. S., at 732; *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999);[9] see also 28 U. S. C. § 2254(b) (exhaustion rule). For this nonjurisdictional rule, the Court has established exceptions based on its assessment of the balance of interests. See *House* v. *Bell*, 547 U. S. 518, 536 (2006). The two exceptions are "cause for the default and prejudice from the asserted error," *ibid.*, and new evidence of actual innocence that demonstrates "more likely than not any reasonable juror would have reasonable doubt." *Id.*, at 538; see also *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977) (cause and prejudice); *Murray* v. *Carrier*, 477 U. S. 478, 495 (1986) (miscarriage of justice).

The marginal benefit of the adequacy inquiry on habeas lies in enabling a federal court to reach a meritorious claim where (1) a state procedural rule has been used to trap a defendant into forfeiting a federal right or a state court had invoked the rule to evade federal law, see *supra* at 8, and yet (2) on federal habeas the petitioner is unable to meet the cause-and-prejudice test. It is difficult to even imagine such a case. In *Lee* v. *Kemna*, 534 U. S. 362, 381-385 (2002), for example, the same factors that led this Court to declare the generally valid state rule to be inadequate as applied on the unusual facts of the case would have been sufficient to constitute "cause" for the *Sykes* rule.[10] The *Sykes* rule does have the additional prejudice element, but an error with no prejudice is not a ground for federal

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9. Arguably, this is the primary purpose of the procedural default rule in habeas. See *O'Sullivan*, *supra*, at 853-854 (Stevens, J., dissenting).

10. The Court refrained from expressly ruling on this point, *id.*, at 387, n. 17, but it seems obvious.

habeas relief in any event. See *Brecht* v. *Abrahamson*, 507 U. S. 619, 623 (1993).

While the separate adequacy inquiry provides little or no marginal benefit, it does so at a high marginal cost, particularly under the extreme version of the rule practiced by the Ninth Circuit. Instead of focusing on the merits of the case and whether the petitioner has already had a fair adjudication in state court, the federal court and counsel must engage in a bizarre exercise of combing through numerous state court dispositions of other cases. See Magistrate Judge's Findings and Recommendations, App. to Pet. for Cert. 17-18; District Court Order, App. to Pet. for Cert. 27 ("sort through thousands of noncapital habeas petitions").

In a world where resources are always limited and legitimate needs are always going unmet, it is a travesty to squander resources on this pointless litigation. The resulting delay contributes to the ongoing violation by the federal courts of crime victims' "right to proceedings free from unreasonable delay." See 18 U. S. C. §§ 3771(a)(7), (b)(2)(A). The *Sykes* and *Carrier* tests cover the ground on whether federal habeas policy requires reaching the merits despite a default in state court. *Amicus* therefore respectfully suggests that this Court consider whether to scrap the "adequacy" inquiry in habeas altogether.

CONCLUSION

The petition for writ of certiorari should be granted.

March, 2010

Respectfully submitted,

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JOINT APPENDIX

COPY

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Supreme Court, U.S.
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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 17, 2010
CERTIORARI GRANTED JUNE 21, 2010

474

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Case No. S105308

RELEVANT DOCKET ENTRIES

United States District Court For The Eastern District Of California

Case No. CIV. S-99-0223 WBS GGH P

February 4, 1999 – Charles Martin files a PETITION FOR WRIT OF HABEAS CORPUS.

January 18, 2000 – Respondent Warden files NOTICE regarding exhaustion of issues.

March 24, 2000 - Martin files NOTICE OF MOTION AND MOTION for stay and abeyance.

July 18, 2000 – The Warden files MOTION for summary dismissal.

March 14, 2001 – Martin files THIRD AMENDED PETITION FOR WRIT OF HABEAS CORPUS.

March 30, 2001 – The Court orders Motion to Dismiss by Respondent DENIED.

July 9, 2001 – The Court orders case STAYED pending exhaustion of new claims.

January 21, 2003 – Martin files FOURTH AMENDED PETITION FOR WRIT OF HABEAS CORPUS.

September 3, 2003 – The Court orders stay LIFTED and directs Respondent to respond.

October 27, 2003 – The Warden files NOTICE OF MOTION for summary dismissal.

November 12, 2003 – Martin files OPPOSITION to Motion for Summary Dismissal.

August 6, 2004 – The Magistrate Judge issues FINDINGS AND RECOMMENDATIONS, RECOMMENDING that Respondent's Motion for Summary Dismissal be granted.

November 8, 2004 – The Magistrate Judge issues SUPPLEMENT TO FINDINGS AND RECOMMENDATIONS modifying earlier findings.

November 29, 2004 – Martin files OBJECTIONS TO FINDINGS AND RECOMMENDATIONS.

March 7, 2005 – The Court hears ORAL ARGUMENT.

March 9, 2005 – The Court orders Respondent's Motion for Summary Dismissal GRANTED and JUDGMENT is entered on behalf of Respondent.

March 22, 2005 – Martin files a NOTICE of APPEAL and requests Certificate of Appealability.

March 24, 2005 – The Court orders that a CERTIFICATE OF APPEALABILITY is GRANTED.

* **

Ninth U.S. Circuit Court of Appeals

Case No. 05-15524

August 30, 2005 – Martin files an Opening Brief and five Excerpts of Record in two volumes.

September 28, 2005 – The Warden files an Answering Brief and one volume of Supplemental Excerpts of Record.

October 27, 2005 – Martin files a Reply Brief.

March 14, 2006 – ARGUED AND SUBMITTED TO ALFRED T. GOODWIN, STEPHEN R. REINHARDT, MICHAEL D. HAWKINS.

July 26, 2006 – The Court FILED MEMORANDUM DISPOSITION: VACATED IN PART; AFFIRMED IN PART; AND REMANDED. JUDGMENT ENTERED.

August 24, 2006 – The Warden files Petition for Panel Rehearing and Petition for Rehearing en Banc.

September 20, 2006 – The Court ordered Petition for Panel Rehearing and Petition for Rehearing en Banc denied.

December 14, 2006 – MANDATE ISSUED.

***

United States District Court for the Eastern District of California

Case No. CIV. S-99-0223 WBS GGH P

October 29, 2007 – The Warden files a MOTION to DISMISS.

February 3, 2008 – Martin files a MEMORANDUM/ RESPONSE in OPPOSITION to the Motion to Dismiss.

February 14, 2008 – The Warden files a REPLY/ RESPONSE to the Opposition.

February 21, 2008 – The Court hears argument.

March 10, 2008 – The Magistrate Judge issues FINDINGS AND RECOMMENDATIONS recommending that Martin's remaining claims be dismissed as procedurally defaulted pursuant to California's timeliness bar.

March 13, 2008 – Martin files OBJECTIONS to FINDINGS and RECOMMENDATIONS.

March 20, 2008 – The Warden files REPLY to Objections.

March 25, 2008 – Martin files RESPONSE to the REPLY.

March 28, 2008 – The Court ORDERS that the FINDINGS and RECOMMENDATIONS are ADOPTED in full. The Court entered JUDGMENT in favor of the Warden.

March 28, 2008 – Martin files NOTICE of APPEAL and requests CERTIFICATE of APPEALABILITY.

April 2, 2008 – The Court ORDERED a Certificate of Appealability issued.

***

Ninth U.S. Circuit Court of Appeals

Case No. 08-15752

October 15, 2008 – Martin files Opening Brief.

October 16, 2008 – Martin files Excerpts of Record in two volumes.

October 21, 2008 – Habeas Corpus Resource Center and Federal Defender file Amicus Curiae Brief.

February 26, 2009 – The Warden files an Answering Brief.

March 11, 2009 – The Warden files Supplemental Excerpts of Record in two volumes.

April 7, 2009 – Martin files Reply Brief.

October 6, 2009 – ARGUED AND SUBMITTED TO FERDINAND F. FERNANDEZ, SIDNEY R. THOMAS and ANN ALDRICH.

November 20, 2009 – FILED MEMORANDUM DISPOSITION REVERSED AND REMANDED. JUDGMENT ENTERED.

December 9, 2009 – The Warden files Motion to Stay the Mandate.

December 18, 2009 – The Court filed Order granting the Motion to Stay pending the filing of a Petition for Writ of Certiorari.

March 2, 2010 – The Court received notice from the Supreme Court: Petition for Certiorari filed on February 17, 2010.

June 24, 2010 – The Court received notice from the Supreme Court: Petition for Certiorari GRANTED on June 21, 2010.

SUPREME COURT
FILED

APR 16 1997

Robert Wanorust Clerk
Deputy

Third Appellate District No. C022364
S059580

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

CHARLES WALKER MARTIN,

Appellant

Appellant's petition for review DENIED.

GEORGE

Chief Justice

SUPREME COURT
FILED
JAN 27 1999

Robert Wandruff Clerk

S071903

IN THE SUPREME COURT OF CALIFORNIA

IN RE CHARLES WALTER MARTIN

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED. (*In re Waltreus* (1965) 62 Cal.2d 218, 225; *In re Dixon* (1953) 41 Cal.2d 756, 759.)

Mosk

Acting Chief Justice

SUPREME COURT
FILED
MAR 18 2002

Frederick K. Ohlrich Clerk
JNH

Deputy
DEE JOSEPH

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S105308

In re CHARLES MARTIN,	) Case No._____
	)(Sacramento County
Petitioner,	)Superior Court No.
	)86F06757
On Habeas Corpus	)(Court of Appeal No.
	)3 Crim. C022364)
_____	)

PETITION FOR WRIT OF HABEAS CORPUS

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Attorney for Petitioner
Charles Martin

The claims set forth herein are appropriately raised in a habeas petition. The evidence of innocence and ineffective assistance of counsel claims are base on matters which do not appear in the record on appeal. *People v Pope* (1979) 23 Cal.3d 412, 428 ["In view of the silence of the record on the reasons why no mental defense was presented, appellant's claim would be more appropriately made in a petition for habeas corpus."]

XIV

Petitioner has acted with diligence in preparing the instant writ petition. Moreover, the People will suffer no prejudice by virtue of being compelled to litigate, at this time the issues raised herein.

In *Vasquez v. Hillery* (1968) 474 U.S. 254, 264-265, the United States Supreme Court expressly declined to hold that a habeas petition is subject to dismissal simply where the government has been prejudiced by delay "based on the difficulties it will face if forced to retry the [petitioner.]" Because, as the Court noted, such a proposal was submitted to Congress by the Judicial Conference Advisory Committee on Criminal Rule, but not adopted by the Congress, "[s]ound jurisprudence counsels against our adoption of tha approach to habeas corpus claims." *(Ibid.) thus,*"the appropriate prejudice determination does not encompass the government's facility in retrying the petitioner, but just embraces its capacity to respond suitably to the petition." *(United States v. Hahodil* (3d Cir. 1994 36 F.3d 323, 327; accord, *Smith v Secretary Dept. of Corrections*

(9th Cir. 1995) 50 F.3d 801, 822, fn. 30 ["the fact that the State may be prejudiced if it is required to retry [the petitioner] is irrelevant"]. In *Nahodil*, because the government was able to respond to the defendant's claim that he received ineffective assistance of counsel during the plea negotiation process and at the plea hearing, the government was precluded from opposing the defendant's habeas petition, despite the death of a key government witness, "by reference to prejudice on that ground." (*United States v Nahodil*, supra, 36 F.3d at p.331.) given the nature of the claim raised herein, it is manifest that the People have the capacity to fashion a response to the instant petition. Thus, laches is unavailable as a defense to the people.

Indeed,"[t]he state bears a heavy burden I seeking a dismissal based on the equitable burden of laches as applied to habeas corpus petitions . . . the burden is on the state to 10 make a particularized showing of prejudice, (2) show that the prejudice was caused by the petitioner having filed a late petition. and (3) show that the petitioner has not acted with reasonable diligence as a matter of law." (Walters v Scott (5th Cir. 1994) 21 F.3d 683, 686-687 [delay of over nine years did not warrant invocation of the common law bar of laches] . Moreover, in light of the nature of the issues involved in this petition, the People will suffer no prejudice by litigating the instant petition at the present time.

WHEREFORE, Petitioner respectfully prays that this court:

1. Issue an order to show cause to the director of the California Department of Corrections to inquire into the legality of his present incarceration:

2. Grant petitioner whatever further relief is appropriate and in the interest of justice.

Dated: March 16, 2002

Respectfully submitted,

/s/

Michael B. Bigelow

08-15752

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES MARTIN,	)
	)
Petitioner-Appellant	)
	)
v.	)
	)
JAMES WALKER, Warden	)
	)
Respondent-Appellees.	)
	)

Appeal from the United States District Court
For the Eastern District of California (Sacramento)
CIV. S-99-223 WBS/GGH P

Honorable William B. Shubb

APPELLANT'S OPENING BRIEF

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08-15752

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES MARTIN,

Petitioner-Appellant

vi.

JAMES WALKER, Warden

Respondent-Appellees.

APPELLANT'S OPENING BRIEF

STATEMENT OF THE ISSUE

1. Whether California's timeliness rule in non-capital cases has become sufficiently clear and consistently applied since *In re Calrk*, 5 Cal.4th 750, (1993);

2. Whether California's timeliness rule in non-capital cases is adequate to bar federal review;

3. Whether the government has met its burden of establishing adequacy as required by *Bennett v Mueller*, 322 F.3d 573 (9th Cir. 2003) and this Court in its order of remand.

SUMMARY OF ARGUMENT

Respondent has failed to meet its burden of showing that the "substantial delay" standard in non-capital habeas corpus cases has been sufficiently clarified by the California Courts since *In re Clark*. In addition, respondent has failed to meet its burden of demonstrating that California's timeliness rule is sufficiently clear or consistently applied.

STANDARD OF REVIEW

This Court reviews the District Court's denial of habeas corpus relief *de novo*. *See, e.g., West v. Seabold*, 73 F.3d 81, 84 (6th Cir. 1996), *cert. denied*, U.S., 135 L. Ed. 2d 1086, 116 S. Ct. 2569. Its findings of fact are reviewed for clear error. *Lopez v Thompson*, 202 F.3d 1110, 1116, (9th Cir. 2000).

STATEMENT OF JURISDICTION

Jurisdiction was conferred on this Court by 28 U.S.C. § 2253. Appellant's Notice of Appeal was filed on March 28, 2008. CR[1] 110; ER 43. A Certificate of Appealability was granted pursuant to 28 U.S.C. 2253(c)(3) on February 23, 2007. CR 36; ER 51.

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[1] "CR" is a reference to the Clerks Record on Appeal; "CT" is a reference to the Clerk's Transcript on appellant's state court appeal; "ER" is a reference to Excerpts of Record. RT is a reference to the Reporter's Transcript on Appeal.

BAIL STATUS

Appellant is in the custody of the California Department of Corrections.

STATEMENT OF THE CASE

Petitioner was charged by information filed February 8, 1995, with one count of first degree murder, California Penal Code section 187, and one count of robbery, California Penal code section 211. A knife use enhancement allegation was attached to each count. California Penal Code section 12022, subd. (b). The special circumstance of murder in the course of a robbery was alleged. California Penal Code section 190.2, subd. (a)(17). CT 7. A jury found petitioner guilty as charged. CT 136-139.

Petitioner was sentenced to life without the possibility of parole, plus one year for the knife use. CT 173. Sentence on the remaining count and allegation was stayed pursuant to California Penal Code section 654. Judgment was entered on September 18, 1995. Notice of appeal was timely filed on October 19, 1995. CT 175.

On January 29, 1997, in an unpublished decision, the Third District Court of Appeal affirmed the conviction and sentence.

On April 16, 1997 Petitioner's Petition to the California Supreme Court for Review was likewise denied and became final on July 15, 1997.

On February 19, 1998, petitioner filed a Petition for Writ of Habeas Corpus with the Sacramento County Superior Court arguing that he received ineffective assistance from both trial and appellate counsel. That petition was denied on

May 19, 1998 because his direct appeal was not then final, and petitioner had not shown his appellate remedy was inadequate.

Thereafter, petitioner filed a series of petitions, raising various claims, with the state courts, each of which was denied.

On February 4, 1999, petitioner filed a petition for writ of habeas corpus with the district court attacking the admissibility of Permenter's statements; his representation by both trial and appellate counsel, and the fact that no instruction on accomplice liability was given. Petitioner also claimed that the trial court failed to dismiss the robbery allegation.

There followed the filing of three amended petitions. But following the magistrate's findings that some claims were unexhausted, the federal proceedings were stayed, on May 15, 2001, and petitioner returned to state court with a new petition to exhaust his new claims.

Petitioner thereafter filed, in the California Supreme Court, claims alleging: Ineffective assistance of counsel for failure to investigate; ineffective assistance of counsel for failure to effectively object to the admissibility into evidence of the Permenter taped interview; denial of due process when his trial counsel permitted the jury, during deliberation to hear a playback of a recorded interview in his absence; ineffective assistance of appellate counsel for failing to raise issues apparent from the record. ER 63.

On September 11, 2002 the California Supreme Court denied petitioner's request for relief, citing *In re Clark* (1993) 5 Cal.4th 750, and *In re Robbins* (1998) 18 Cal.4th 770. ER 151.

On January 21, 2003 petitioner filed his fourth amended petition alleging five claims. One and two, that he had been denied a fair trial when the trial court failed to dismiss the first jury pool and properly instruct the jury; three, that he had been deprived of effective assistance of counsel for failure to investigate; four, that he had been deprived of effective assistance of counsel when his trial counsel failed to effectively object to the admission of a taped interview; five, that he had been denied effective assistance of counsel when his trial counsel agreed in his absence to the play back of a record witness interview in his absence; six, denial of effective assistance of appellate counsel. ER 152; CR 45.

Thereafter, followed additional litigation not relevant to this appeal, followed in turn by findings and recommendations and supplemental findings by the magistrate court on November 8, 2004. CR 60. There the magistrate judge found that claims 1 and 2 are procedurally barred pursuant to *In re Dixon* and that claims 3-6 were procedurally barred pursuant to *In re Clark* and further found that claims 3-6 did not relate back in light of the Supreme Court holding in *Felix v Mayle.*

On March 9, 2005 the district court judge adopted the magistrate's findings and recommendations, as supplemented, in full. CR 67.

On March 22, 2005 petitioner timely filed his notice of appeal, CR 69 and a request for a certificate of appealability, CR 70, which was granted. CR 71.

On July 26, 2006, the Ninth Circuit Court of Appeals decided the appeal following briefing and oral argument. In a Memorandum, this Court ruled that the question of whether claims three through six were procedurally barred by California's timeliness

rule was controlled by *King* v. *LaMarque,* 464 F.3d 23 963 (9th Cir. 2006) and remanded the matter back to district court for further proceedings. ER 53 .

On October 29, 2007 respondent filed its motion to dismiss in district court. CR 98.

On February 23, 2008 petitioner filed its opposition brief. CR 101, and on February 14, 2008 respondent replied. CR 102.

On March 10, 2008, following hearing on February 21, 2008, the Magistrate Judge issued findings and recommendations dismissing the petition in its entirety. CR 103, CR104; ER 1, 30.

Objections to Magistrates findings and recommendations were filed on March 13, 2008. CR 105.

The District Court's Order adopting the magistrate's findings in full was filed on March 28, 2008. CR 108; ER 41.

On March 28, 2008 a Notice of Appeal and Certificate of Appealability were filed. CR 110, 111. ER 43, ER 45.

The District Court granted petitioner's request for a certificate of appealability on April 1, 2008. CR 112; ER 51.

STATEMENT OF FACTS[2]

On December 7, 1986, Nathan Hall found a wallet near the edge of the Sacramento River. Later he discovered a plywood box ten to twelve feet from the water. RT 201-202. Inside was a large plastic bag that contained what appeared to be human skin. In

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[2] Again, the statement of facts is in abbreviated form, and only for context.

fact, it was a corpse, RT 207 later identified as Charles Stapleton.

The wallet contained petitioner's identification.

On December 10, 1986 officers interviewed Bonnie Permenter, petitioner's seventeen-year old friend and the mother of his child. RT 152. Permenter supplied the following information: the previous Friday [December 5] petitioner showed up with about $1,000 in small bills and about one-half ounce of methamphetamine. Corrected CT 20, 22. On Friday or Saturday, petitioner had a large wooden padlocked box in the back of his which he said contained tools. Corrected CT 28-29. Petitioner was home all day Saturday [December 7]. He went fishing between 11:00 PM and midnight on Saturday night. At about 1:00 AM Sunday morning [December 7] petitioner called to say his car was stuck in the sand down the road from a business named Viera's. Corrected CT 3. Permenter picked petitioner up near Viera's at about 1:30 AM. Corrected CT 4-5. Petitioner said the box had broken and he didn't want to talk about it. He said he had used pieces of the box to put under the tires of the stuck car. Corrected CT 37-38. Petitioner tried to pull the car out himself, but couldn't manage it. Corrected CT 24-25.

Permenter and petitioner sat at home talking until about 5:30 AM or 6:00 AM, when petitioner called a tow truck. Corrected CT 5. Permenter dropped petitioner off at his car and the tow truck was already there. Petitioner's car was stuck in a position facing the river. Corrected CT 6. Petitioner returned home about 9:00 AM or 10:00 AM that morning. Later he went fishing with Austin.

Corrected CT 7, 9. According to Permenter, petitioner said something about having lost his wallet. Corrected CT 33.

Later that day Permenter went to Antioch, then returned to Isleton for a few minutes. She saw petitioner and Austin making lunch, and then she left for Sacramento. Corrected CT 8, 10. Permenter denied having seen petitioner since that Sunday. Corrected CT 11.

In response to increased pressure from her interviewers, Permenter said that one night petitioner had mentioned, "something' about some guy that had some drugs and some money and stuff, and him and Bobby [Austin] had talked about, you know, bumpin' him off or somethin." Corrected CT 16. Permenter had said that she didn't want to hear about it.

When petitioner showed up with money and drugs, he refused to answer Permenter's questions Corrected CT 17, but did say, "All I did was rob him." Corrected CT 20, 36. Petitioner described the guy as older, a child molester, and a junkie. CT 17-18. Permenter also opined that Austin had set the whole thing up by sending petitioner to a pre-arranged meeting with the guy. Corrected CT 40.

During a December 12th unrecorded interview, Permenter again recounted the events of the previous days. Petitioner had gone to Austin's house on Friday morning [December 5]. When he returned at 4:00 PM or 5:00 PM he had drugs with him. He said he had hit a guy on the back of the head and robbed him and that was how he obtained the money and crank. RT 158. He might have had his wallet with him at that time. RT 158, 159.

On Saturday [December 6] at about 9:00 AM or 10:00 AM petitioner told Permenter he was going to Austin's. He returned at about 3:00 PM or 4:00 PM. It was at that time Permenter saw a box in the back of petitioner's Ranchero.

That same afternoon, Permenter and petitioner drove to Kmart with the box in the back. She thought petitioner had his wallet with him at the time. RT 158-159. That night, petitioner was in and out of the house until Austin called to say he did not know when he would be over with the truck. Petitioner left and came back around 2:00 AM or 3:00 AM. Then petitioner, driving the Riviera, left again. He called about 45 minutes later to say that he was stuck. Permenter drove the Ranchero to pick him up, but the box was gone. RT at 160.

When Permenter arrived on scene to help petitioner, petitioner mentioned that his wallet was missing. They finally called a tow company to move the car. RT 161.

The next morning [Sunday, December 7] petitioner went fishing with Austin. When Permenter arrived, petitioner gave her a one hundred-dollar bill. Permenter left to go shopping and she did not see petitioner or Bobby again. RT 162.

Permenter told Detective Bell that petitioner had admitted discussing a plan to rob and kill a drug dealer in Vallejo. RT 163. Petitioner had about $1,000 in a paper bag. He said he and Bobby got half the money for setting it up. Petitioner said he would take the whole blame if anything went wrong. RT 164-165.

A defense expert testified that Permenter's long-term drug and alcohol abuse could have affected her memory. RT 478, 481, 484.

Two Cadillacs belonging to the victim were found by the police at Austin's home. RT 170. Wood scraps at Austin's home could not be matched to the wood of the box. RT at 446. No handcuffs were found at Austin's house. RT 456.

Following presentation of the evidence, petitioner moved for dismissal of the robbery, citing insufficient evidence. The Motion was denied. CT 72-73.

During the course of deliberation the jury requested the Permenter taped interview and the crime scene video for replaying in the jury deliberation room. The trial court granted the request.

Petitioner was neither present at the time of the request, nor knew of the request. Moreover, at no time did petitioner authorize or agree to the replaying of either recording in his absence. Nonetheless, trial counsel failed to object to either the replaying of the recording or the replaying of the recording in petitioner's absence. CT 135.

The Section 402 Hearing

On August 8, 1995, the trial court held an Evidence Code section 402 hearing to determine the admissibility of Permenter's taped and reported statements to the police.

Although she stated that she vaguely remembered a body being found in the river and reading about it in the newspaper, she denied any memory of any conversations with the police on the topic. RT 17, 21-30. She also testified that neither petitioner nor anyone else had ever confessed to her about having been involved in the murder. RT 18-19.

She acknowledged that had she spoken to the police in 1986, she would not have lied to them, but would have told the truth. However, she also stated that she had no basis for saying that her statement to the police in 1986 was actually true. RT 39. Permenter admitted that she had abused both alcohol and methamphetamine for many years and that as a result she had gone through a court-ordered drug program in Illinois. Nonetheless, at the time of her 1986 interview she was again drinking and using cocaine. RT 29-30. She opined that her lack of memory relative to the 1986 interviews might have been due to her drug use, RT 31, an opinion shared by a witness, expert in methamphetamine and alcohol dependency who did not testify at the Section 402 hearing, but testified later during trial. RT 473, 478,481, 484.

The trial court ruled that even if Permenter were using methamphetamine in 1986, she would have remembered a statement made to her. The fact that Permenter made a statement to the police was proof that she recalled petitioner's statements. Accordingly, the court found that Permenter was feigning her memory loss as to the original statement and petitioner's admissions. RT 42.

LAW AND ARGUMENT

I

RESPONDENT HAS FAILED TO MEET HIS BURDEN OF DEMONSTRATING THAT CALIFORNIA'S TIMELINESS RULE IS SUFFICIENTLY CLEAR; THAT THE "SUBSTANTIAL DELAY" STANDARD IN NON-CAPITAL HABEAS CORPUS CASES HAS BEEN SUFFICIENTLY CLARIFIED BY CALIFORNIA COURTS. NOR HAS RESPONDENT MET ITS BURDEN OF ESTABLISHING THAT THE RULE IS CONSISTENTLY APPLIED IN NON-CAPITAL HABEAS CORPUS CASES

A. Introduction

In *King v Lamarque*, 464 F.3d 963, 968 (9th Cir. 2006) this Court articulated California's timeliness rule, which applies to both capital and non-capital cases, and its concerns with the rule, as follows:

> California's timeliness rule bars habeas petitions that are filed after "substantial delay." A habeas petitioner in California must justify any "significant delay" in seeking habeas corpus relief. There are no standards for determining what period of time or factors constitute "substantial delay" in non-capital cases. There are also no standards for

> determining what factors justify any particular delay.

Id. at 966 (internal citations omitted). The Court also noted that in capital cases:

> California's Supreme Court Policies Regarding Cases Arising From Judgments of Death "Policies" create a presumption of timeliness if a petition "is filed within 90 days of the final due date for the filing of an appellant's reply brief." [citing *in re Clark*, 5 Cal.4th 750, 751 (1993)]. The Policies also create more explicit standards for deciding whether there has been substantial delay when the petitioner has filed after the ninety-day presumption period. *Clark* clarified the application of the Policies within capital cases and provided four specific exceptions for granting review even when a petition's "substantial delay" is unjustified. But *Clark* did nothing to clarify the application of the basic "substantial delay" standard with regard to noncapital cases. Furthermore, the *Clark* exceptions, specifying when review can be granted despite "substantial delay," do nothing to clarify the "substantial delay" standard itself.

Id.

The Court noted further:

> Here, because we held in *Morales*, that the California timeliness rule was insufficiently clear, the government must show on remand that the rule has since been clarified for non-capital cases and that the clarified rule has since been consistently applied.

Id. at 967. *See, Morales v Calderon*, 85 F.3d 1387, 1393 (9th Cir. 1996).

In this matter, petitioner's claims three through six were remanded in light of *King* and for a determination of whether California's timeliness rule has been clearly and consistently applied with regard to non-capital cases[3]. Thus, on remand, in order for the government to prevail, it was bound to prove, and the district court was bound to determine that the timeliness rule has become sufficiently clear and consistently applied since 1992, and in particular, since 1999 when the procedural default in this case is alleged to have occurred. *See, Fields v Calderon*, 125 F.3d 757, 760 (9th Cir. 1997) (holding that the proper date on which adequacy of state rule is analyzed is

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[3] Specifically, this Court stated: "On remand, in order to be able to maintain its affirmative defense of procedural default, the government must show that cases after *In re Clark*, 855 P.2d 729 (Cal.1993), had sufficiently clarified the rule and that it had been consistently applied. Memorandum, at pg 2. ER 54.

time when defaulted claims should have been raised on direct appeal or filing of habeas petition, not when procedural bar at issue actually applied by the state court).

The government has failed to meet its burden, and the district court's determination that it has, must be reversed.

B. The Government's Argument Below and the District Court's Findings[4]

1. On Clarity of the "substantial delay" standard

In its motion for summary dismissal, CR 95, the government spent considerable effort extolling the virtues of *In re Robbins* 18 Cal.4th 770 (1998), *In re Gallego,* 18 Cal.4th 825 (1998), and *In re Sanders,* 21 Cal.4th 697 (1999) as California's Timeliness Rule bellwether of clarity, the archetype of lucidity, arguing, ad infinitum that they singularly, and collectively, sufficiently clarify California's Timeliness rule *in non capital cases*[5].

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[4] The district court adopted Magistrate Judge Hollows Findings and Recommendations of March 10, 2008, ER 30, adopted by order dated March 28, 2008. ER 41.

[5] Lacking much by way of other authority, the government attempts to resolve the question of whether California's Timeliness Rule applies equally to non-capital cases in a single sentence, and a single citation to *In re Sanders*. There the government states: "*In re Sanders*, at 703, makes it clear that timeliness rules apply equally to capital and non-capital defendants." CR 95, Government Motion for Summary Dismissal ER 57.

Although conflating somewhat the two issues (clarity of the rule, and the rule's consistent application) the district court agreed with the government, stating that, "[if the rule were not well established in non capital cases] it would make little sense for the California Supreme Court to cite the cases of *Clark* and *Robbins*, both capital cases, when determining a timeliness bar in ordinary habeas actions – a ruling and citation which occurs perhaps thousands of times a year." ER 34. The district court found specifically that, "[t]he application and citation of *Clark/Robbins* rule is well established for non-capital cases." *Id.*

Elaborating a little on whether the rule is "clearly defined" the district court then concluded that since the state rule is identical to the AEDPA limitations period, to wit: "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," a standard clear enough for federal practice, then, "it is clear enough for state practice as well." (Citation omitted.) ER 36.

2. On Whether the Rule is Consistently Applied

The government and the district court further analyzed the California Timeliness Rule from the standpoint of whether the rule is, or has been, consistently applied. ER 36, 57.

To prove its point, the government relied on a survey of 370 habeas case, analyzed 100 of them, and so concluded that the California Supreme Court cited *Clark/Robbins* 27 times and that eight petitions, although filed more than three years and five months

after finality, received no citation to timeliness. The government went on to *hypothesize* that each of the eight fell within appropriate exceptions, even though in none was the exception articulated. ER 61, 62.

Similarly, the district court looked to its own survey of explicated decisions, while eschewing review of "so called 'postcard denials'," ER 36-40, and concluded from it that the *Clark/Robbins* timeliness bar, and its exceptions, have been consistently adhered to. ER 39.

C. Discussion

1. Substantial Delay – The Government's Burden Has Not Been Met. The Standard Remains Unclear.

"Because it is the State who seeks dismissal based on the procedural bar, it is the State who must bear the burden of demonstrating that the bar is applicable." *Bennett v Mueller*, 322 F.3d 573, 586 (9th Cir. 2003). To be applicable the rule must be adequate, that is, clearly defined, well established and consistently applied.

The government contends, and the district court found that the California Supreme Court has established a definite timeliness rule in four capital cases: *In re Clark, In re Gallego, In re Robbins and In re Sanders*. Both contend that these cases have firmly established that any habeas petition must be filed without "substantial delay" and that any such delay must be justified with sufficient particularity. Neither proposes a definition from which others less versed might glean some meaningful understanding,

of what is meant by the expression, "substantial delay."

In *Robbins*, the state high court explained that "[s]ubstantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." *Robbins* at 777. However, the court failed to explain what is meant by "substantial delay" or provide any standards or guidance for a habeas petitioner to determine how much delay is considered substantial.

In *Sanders*, the State Supreme Court decided that abandonment by counsel can constitute good cause for substantial delay, *In re Sanders,* at 701, but did nothing to shed light on what in fact constitutes substantial delay. *Id.* at 704.

Nor is *In re Gallego,* 18 Cal.4th 825, 828, helpful. There the court declared that when a request for investigation funds is denied, the California Supreme Court cannot properly find that the petitioner should have discovered the information in support of his claim without first obtaining funding from some other source or learning of the information in some other manner. *Id.* at 828-829. Again, the state high court failed to provide any semblance of a standard by which mere mortals might understand what constitutes "substantial delay." And, not to put too fine a point on it, even Justice Brown has acknowledged, in her concurring and dissenting opinion in *In re Gallego,* that as currently articulated, California's timeliness bars, "are too vague to constitute adequate state grounds" to bar federal habeas corpus review. *Id.* at 845.

Although both the government and the district court opine that the timeliness rule in all four cases clarify and firmly establish the intended meaning of the dictate that any habeas petition must be filed without "substantial delay," and that any such delay must be justified with sufficient particularity, they in fact do not.

The fact of the matter is that none of the cited cases sufficiently clarifies the "substantial delay" standard for *non-capital* cases and this case was, after all, remanded by this Court for the district court to consider whether California's timeliness rule has been clarified for non-capital cases. Moreover, in *Bennett*, this Court held that it was "inappropriate" for the district court to rely on capital cases when analyzing the adequacy of California's timeliness rule in non-capital cases. *See, Bennett*, 322 F.3d at 583. Additionally, this Court has explicitly rejected the government's reliance on *Clark*. *See, King*, 464 F.3d at 966. ("*Clark* did nothing to clarify the application of the basic 'substantial delay' standard with regard to non-capital cases.") Besides, and one should again take note, this Court's order on remand was for the government to show that the rule set forth in *In re Clark* has, "since been clarified for non-capital cases and that the clarified rule has since been consistently applied," *King v. Lamarque*, 464 F.3d at 968, citing *Morales v. Calderon*, 85 F.3d 1387, 1390-92 (9th Cir. 1996). ER 8 at pg 2. Thus, citing to *Clark* fails to facilitate resolution of this Court's inquiry.

Indeed, both the government and the district court seemingly ignore this Court's dictate, contending as they do that although *Robbins, Gallego and Sander* were capital cases, the Supreme Court's

discussion of the timeliness rule in all three cases is applicable to both capital and non-capital petitions. What is more, to read these cases so generally is a mistake. The state high court itself stated that it issued an order to show cause in *Robbins* and *Gallego*, "not to consider the merits of the claims raised in the respective habeas corpus petitions, but instead to address a number of general procedural issues relating to petitions for writs of habeas corpus in *capital* cases, and, in particular, to address the question of the timeliness claims advanced in such petitions." *Robbins*, 18 Cal.4th at 779 (emphasis added). Similarly, in *Sanders*, the Supreme Court held, "[o]n the particular facts of this case, we conclude that when, as here, an attorney representing a *capital* defendant essentially abandons his client and fails, in the face of triggering facts, to conduct an investigation in order to determine whether there exist potentially meritorious claims, such abandonment constitutes good cause for substantial delay in the presentation of potentially meritorious claims by subsequent counsel." *Sanders*, 21 Cal.4th at 701 (emphasis added). And, to the extent that *Sanders'* discussion of the timeliness rule does apply to non-capital cases, the clarity of *Sanders* has been seriously questioned.

> [I]n *In re Sanders*, . . . a fractured court gave various reasons why it found a petition (in which the number of claims was not indicated) to be timely; no opinion in the case commanded a majority of the court. Indeed, the author of *Clark* himself declared that *Sanders* 'contradict[ed]"

> the court's untimeliness rule. 87 Cal. Rptr.2d 899, 981 P.2d at 1061 (Baxter, J., dissenting). According to another justice in that case, the court's application of the untimeliness bar has been "arbitrary and capricious. *Id.* at 1057 (Mosk, J., concurring).

Dennis v Brown, 361 F. Supp.2d 1124, 1134 (N.D. Cal.2005).

Relying on its belief that "the application and citation of [the] *Clark/Robbins* rule is well established for non-capital cases," ER 35, the district court attempts to equate California's timeliness bar to AEDPA's limitation period enunciated at 28 U.S.C. 2241((d)(1)(D) by pointing to *Bennett's* "distill[ation] of the rule to its essence: 'Significant, unjustified delay in presenting habeas claims to California state courts will bar consideration of the merits of the claim.'" ER 35. Concludes the district court, "[i]f this principle of requiring due diligence is clear enough for federal practice, and it is, it is clear enough for state practice as well." ER 35. But the two rules are really quite different, the conclusion unwarranted, a complete non- sequitur.

Quite true, the triggering date for measuring delay for both state and federal rules[6] is nearly the same, albeit stated differently. In the state's scheme of things the triggering date, or predicate, is measured from the time the petitioner knew, or counsel knew or reasonably should have known of the

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[6] For this discussion it is assumed Sections 2241((d)(1)(A), (B) and (C) are inapplicable.

information offered in support of the claim and the legal basis of the claim. *Bennett*, 322 F.3d at 581. Under AEDPA, the triggering date is the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. 2241((d)(1)(D). Thus, if, hypothetically, on January 1st petitioner learned for the first time that some unscrupulous prosecutor had secreted the existence of a third person's audio taped confession at the time of his trial some years earlier, under both rules, the triggering date would be January 1st. But there the similarity between the two rules ends.

Under AEDPA, the petitioner would have one year from the date of the concealed tape's discovery within which to get his Due Process/Brady violation claim to federal court[7]. In other words, in order to fall within the AEDPA's limitation period, petitioner need only establish the predicate, the fortuitous discovery of the tape. Once established, so long as petitioner's claim is filed in federal court within one year, it will be heard on the merits.

However, under California's timeliness rule, assuming the same predicate and triggering date of January 1st, whether petitioner's claim is time barred depends not on whether it is filed in the state court within some discernable time period thereafter, but whether his claim is filed after that date without "undue" or "substantial delay," *Bennett*, 322 F.3d at 581; that it is filed within some indeterminate and undefined time period, *see, Carey v. Saffold*, 536 U.S. 214, 221-22 (2002), filed by some undetermined, and

[7] Taking into account all tolling provisions.

undeterminable date – concepts fraught with latent ambiguity[8].

Although latent ambiguity, as a concept, is dealt with primarily in the milieu of contract litigation, ambiguity in the world of criminal law is sometimes an issue of import as well, most often in the context of the Rule of Lenity. That rule ensures the Fifth Amendment's fair warning requirement is met by resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. *See, United States v. Lanier*, 520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997). The rule itself provides that, in the course of interpreting statutes in criminal cases, a reviewing court should resolve ambiguities affecting a statute's scope in the defendant's favor. *See, e.g., Hughey* v. *United States*, 495 U.S. 411, 422,(1990); *Crandon* v. *United States*, 494 U.S. 152, 158, (1990); *United States* v. *Gibbens*, 25 F.3d 28, 35 (1st Cir. 1994). But the *sine qua non* for the rule's application is genuine ambiguity, and a statute is not ambiguous simply because litigants (or even an occasional court) question its interpretation. *United State v Nippon Paper*, 109 F.3d, 8 (1st Cir. 1997). It is only when no reasonably clear meaning can be

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[8] Generally speaking, a latent ambiguity is one which "appear[s] only as the result of extrinsic or collateral evidence showing that a word, thought to have but one meaning, actually has two or more meanings." Richard A. Lord, 11 Williston on Contracts, § 33:40 (4th ed. 1999). Thus, in the context of a contract to deliver roofing materials to the "San Francisco residence at the corner of Spruce and Washington" the seemingly unambiguous language of the agreement is rendered quite uncertain when the roofing company arrives at that intersection and finds there to be four corners, and a residence on each of them.

gleaned from the text of a statute, leaving courts to guess at what Congress intended, that the rule of lenity comes into play. *Id.* In other words, "the rule of lenity applies only if, after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended." *Reno v Koray*, 515 U.S. 50, (1995) (citations omitted); *accord United States* v. *O'Neil*, 11 F.3d 292, 301 n.10 (1st Cir. 1993) (describing the rule of lenity as "a background principle that properly comes into play when, at the end of a thorough inquiry, the meaning of a criminal statute remains obscure").

And so it is here. The concepts of "delay" and "substantial delay" in the context of California's timeliness rule, contain ambiguous elements, their meaning obscure, accentuated by the California state court's opinions and orders which are determined by an "impossibly amorphous standard" and "nebulous as well as riddled with exceptions and requiring fact-specific analysis, *Gallego,* 18 Cal.4th at 84 (Brown, J., concurring in part and dissenting in part). Furthermore, the rule is "indeterminate at [its] very core," the result of which is that, "its application to any given claim may yield varying results, as reasonable persons differ as to whether the claim in question has been presented without 'substantial delay' and, if not, whether 'good cause' exists for any such delay." *In re Robbins,* 817 fn.3 (Mosk, J, concurring).

It is submitted that since *Clark* neither Justice Brown nor Justice Mosk[9] would write differently. Besides, even if the various meanings of "delay" and "substantial delay" and "good cause" could

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[9] Were he alive today to do so.

sufficiently be identified, application would continue to remain an elusory process because even reasonable jurists are sometimes affected by external stimuli upon their own state of mind, leading to inconsistent and even arbitrary decisions. ER 37 (where the district court noted that the timeliness rule may not have been applied by justices either arbitrarily or because it was not seen by them or because the timeliness issue was problematic).

Accordingly, if justices from the California Supreme Court find the rule ambiguous, and district court judges can't themselves consistently tell why or even when it will be applied, it may hardly be said the rule gives "fair warning" to the lay person.

Undeniably, the California rule is vague and internally standardless: "diligence" is required, but nowhere defined. "Undue delay" is frowned upon, but nowhere defined. No rule of court or authoritative holding tells non-capital petitioners when a habeas petition will be considered presumptively timely, and when it risks dismissal on timeliness grounds. *See, Bargas v. Burns*, 179 F.3d 1207, 1212 (9th Cir. 1999) (procedural rule must be sufficiently clear to put petitioner on notice regarding its application to his case), cert. denied, 529 U.S. 1073 (2000); *Karis v. Vasquez*, 828 F.Supp. 1449, 1464 (E.D.Cal. 1993) (timeliness rule which is "standardless both substantively and as to duration" does not provide petitioners with adequate notice of the circumstances that will bar their claims, therefore will not support procedural default).

Courts which decide state habeas petitions, respondents and deputy attorney generals who represent them in opposition, all speak to the "well established" rule emphasizing timeliness and

diligence as general values. However, the frequency or vehemence with which broad principles are invoked cannot substitute for concrete terms which provide guidance to petitioners and permit consistent application by the courts. Adequacy requires that even a discretionary rule operate within clearly discernible limits. *Wood*, 130 F.3d at 376. Put another way, a rule plainly is not "clearly established" unless it gives practical guidance to those who must follow it. Clarity of language is not enough; to support a procedural default the rule must clearly and reliably indicate what does and does not constitute compliance. See, *Bargas*, 179 F.3d at 1212; *Karis*, 828 F.Supp. at 1464.

Thus, the mere fact that the California courts cite *Clark* and *Robbins* when denying non-capital habeas petitions as untimely, does not mean that the California courts have clarified the application of the basic "substantial delay" standard with regard to non-capital cases. The district court's conclusion to the contrary is just wrong.

In addition, the district court's reliance on *Bennett* as having "easily distilled the rule to its essence[,]" ER 35, is interesting, and perhaps imperfectly placed. It is true that *Bennett* restated the general rule that unjustified delay in filing a habeas corpus petition will bar those claims. *Bennett*, however, remanded for a determination of the adequacy of the state timeliness bar, and explicitly noted the important distinction between capital and non-capital cases. *Bennett*, 322 F.3d at 583-584. *Bennett* did not deal with the question presented to the district court here on remand, namely whether California's timeliness rule, and the "substantial delay" standard, have been clarified for non-capital

cases. Certainly, if *Bennett* had resolved this important question, the remand would have been unnecessary.

2. California's Timeliness Bar is Inconsistently Applied; The Government has Failed to Prove the Converse and the District Court Erred In So Finding

As previously noted, a state procedural bar is inadequate to support a state-court judgment if it is not "clear, consistently applied, and well-established at the time of the petitioner's purported default." *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994); *see also Lee v. Kemna*, 534 U.S. 362, 389, 151 L. Ed. 2d 820, 122 S. Ct. 877 (2002). A federal court "should not insist a petitioner, as a procedural prerequisite to obtaining federal relief, comply with a rule the state itself does not consistently enforce." *Siripongs v. Calderon*, 35 F.3d 1308, 1318 (9th Cir. 1994). Nor should a federal court enforce a bar grounded in a rule that is unclear or uncertain. *See Morales v. Calderon*, 85 F.3d 1387, 1390-93 (9th Cir. 1996).

At least one district judge has held that the California cases demonstrate the *inconsistent* application of the rule. *Dennis v. Brown*, 361 F.Supp.2d 1124, 1133-34 (N.D.Cal. 2005) (Fogel, J.). The Dennis court found that the California Supreme Court's published opinions regarding timeliness in the capital context demonstrate the inadequacy, rather than the adequacy, of the state's timeliness rule.

Curiously, the district court here states that the California Supreme Court rules on the timeliness bar, and cites to *Clark and Robbins*, "*perhaps thousands of times a year*." ER 34, emphasis added. And from a survey of his own, the district court finds a, "significant number" of explicated decisions, but actually cites only to fourteen, one as old as 1995, but most from 2006 to 2008, on the subject of the *Clark/Robbins* timeliness bar. ER 39-36.

As discussed at length post, the reality is that the Supreme Court does not cite to *Clark/Robbins* "thousands of times a year" and the fact that a few cases discuss *Clark/Robbins* does absolutely nothing to clearly define the rule or establish it as consistently applied. More to the point, even if *Clark/Robbins* were applied "thousands of time a year" (which it is not) a rule consistently invoked does not mean that the rule is consistently applied, and neither the district court's survey, nor the government's survey, nor the cases cited by either has established the consistent *application* of the rule; or that the rule has been applied in a consistent manner.

And, significantly, the district court acknowledges this latter shortcoming.

> [T]he decision to reach the merits could mean one of several things: a rigorous review was applied, including the exceptions which are part and parcel of the bar, and the court found justification or a viable exception; it could mean that petitioner did meet his burden to explain the delay; it could mean that the court didn't even see the timeliness issue; it could mean that the timeliness issue was

> problematic that it was much easier in that case to reach the merits; it could mean that the court arbitrarily determined that no bar would be imposed.

ER 37.

Although the district court apparently sees no harm in it, our judicial system does not permit of judicial decisions "arbitrarily" made. Consistent application in manner is required, and the government has failed to meet its burden that the rule is applied in a consistent manner as this Court has required it to do.

There is a further reality of note. Since the year 2002, the California Supreme Court has issued an approximate average of 2,763 postcard denials of habeas corpus cases per year. Of those, the California Supreme Court cites to *In re Clark* or *In re Robbins* or both, on average, approximately, a mere 703 times per year[10] or, approximately 25% of the time. Hardly

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[10] These data are arrived at by running a series of searches in LexusNexus (an on-line research product) for the years 2002 through 2007 and adding the results. Because of large number of documents retrieved from each search, each year must be divided into six-month segments (January 1st to June 30th; July 1st to December 31st). The search results are then added together to provide data for the entire year.

To determine the number of habeas cases denied by the California Supreme Court from 2002 to 2007, in Source - CA Criminal Cases, enter in *Terms and Connectors* the following search terms (where *yy* is the year): "**date aft (1/1/yy) and date bef (6/30/yy) and habeas corpus and denied and court (Supreme Court)**. The documents retrieved reflect the total number of habeas cases denied by the Supreme Court.

(continued...)

a majority of the time. When one factors in that at least some of these cases are capital cases, the district court's pronouncement, that *Clark* and *Robbins* are cited "perhaps thousands of times a year" in ordinary, non-capital habeas cases, ER 34, and its principal justification for finding California's timeliness bar to be well established, is poorly considered.

If California's timeliness bar is consistently applied, as the district court believes it to be, then a whopping 75% (approximately) of non-capital habeas cases filed during the time period from 2002 up to and including 2007, were filed in a timely manner[11]. Common sense, logic, and experience tell us this cannot be the case and is not the case. Thus, again, even if the rule is shown to be consistently invoked, the government, whose burden it is to do so, has not

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(...continued)

To determine the number of denied habeas cases citing to *Clark* and/or *Robbins*, enter in *Terms and Connectors* (where *yy* is the year): "**date aft (1/1/yy) and date bef (6/30/yy) and habeas corpus and denied and "in re Clark" or "in re Robbins" and court (Supreme Court)**. The result reflects the number of denied habeas cases citing *Clark* and/or *Robbins*. Subtract the latter number from the former and the result discloses the number of habeas cases *which do not* cite to *Clark* and/or *Robbins*.

By way of further example, using the above search method discloses that in the year 2007 the California Supreme Court denied 3,134 habeas cases. Of those, 809 cited to *Clark* and/or *Robbins*. Thus, 2,395 were denied without citation to California's timelness bar. In 2006, the results were similar, with 3,519 denials, 968 cited timeliness, leaving 2,551 without reference to the bar.

[11] Assuming, of course, we know what "timely" or "without substantial delay" means. We do not, and so we probably should not even reach this issue.

come close to proving that the rule is applied consistently in manner.

3. "Postcard Denials" Must They Be Considered?

The district court states emphatically that "no" they must not be, explaining that,

> [t]he unexplained denial, or unexplained determination to review and deny on the merits, is absolutely of no analytical value,

ER 36, rationalizing that a simple denial could be that:

> [T]he court found justification or a viable exception; it could mean that petitioner did meet his burden to explain the delay; it could mean that the court didn't even see the timeliness issue; it could mean that the timeliness issue was problematic that it was much easier in that case to reach the merits; it could mean that the court arbitrarily determined that no bar would be imposed.

ER 37.

It seems a bit dubious to require the government to prove its case, that California Supreme Court Justices apply the rule to all, or at least in the majority of non-capital habeas corpus cases on the one hand, and then on the other, lighten the government's burden, saying to it, in effect, "golly gee whiz, there's no need to look at, consider or

analyze 75% (approximately) of the denied habeas corpus cases because they are of no analytical value." The problem, of course, with post card denials is that the state court, exercising its judicial discretion, did so without a single word of explanation, without a single articulated reason, or articulated factual determination, and without any kind of record upon which a reviewing court, or for that matter, the public, is able to determine if the state court actually considered the proper facts and applicable exceptions.

Judicial discretion is a powerful thing. Discretion is the ability to choose. "To say that a court has discretion in a given area of law is to say that it is not bound to decide the question one way rather than another." *Pullman v Swint*, 456 U.S. 273, 288 (1982). Moreover, as long as a court exercises its discretion fairly and impartially, a reviewing court will not reverse unless it finds that the ruling constitutes an abuse of discretion. *See, United States v Novak*, 918 F.2d 107 (10th Cir. 1990). "[J]udicial discretion is the exercise of judgment according to standards that, at least over time, can become known and understood within reasonable operating limits." *Moralaes*, at pg 1392.

An exercise of discretion is substantially immune from reversal if based on a consideration of proper factors, but a failure to articulate the basis for its action leaves the ruling vulnerable to an attack for abuse. Without a sufficiently articulated finding, or statement of reasons, there is no basis for a reviewing court to conclude a lower court actually considered the proper facts.

Thus it is that in other contexts a failure to articulate findings or provide a cogent statement of

reasons a reviewing court may well remand to give the lower court an opportunity to do just that. *See generally, United States v. Stoterau*, 524 F.3d 988 (9th Cir. 2008) (sentencing); *United States v. Lewis*, 518 F.3d 1171 (9th Cir. 2008) application of the speedy trial act; *United States v. Taylor*, 487 U.S. 326, 334-35, (1988) (dismissal of an indictment with or without prejudice); *United States v. Sullivan*, 522 F.3d 967, 981 (9th Cir. 2008) (motion for severance).

"Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust. *See United States v Rita*, 127 S.Ct. 2456, 2468 (2007).

An explanation communicates that the parties' arguments have been heard, and that a reasoned decision has been made. An unknown, unarticulated exception, which *could* have been applied; a *problematic* timeliness issue, thus ignored, or an *unseen* timeliness issue, and for that reason ignored, gives no confidence at all in judicial discretion, or the exercise of judicial judgment. Nor does a decision applied *arbitrarily*.

But that is what we have here, with the state's post-card denials; unknown and unarticulated exceptions to an already amorphous rule, or, unknown unarticulated *raison d'être* for application of the rule. In approximately 75% of the habeas corpus cases denied by the California Supreme Court neither we nor anyone else have any idea why the state high court exercised its discretion in the manner in which it did. Thus, although they may not individually be considered, because there is no available record to consider, post-card denials may

not be ignored either. In consideration of the whole, they are found wanting, devoid of reasons, lacking of factual findings and, because they are, at least in part, considered by the district court to be arbitrarily decided, they must be counted against the government's ability to meet its burden of proof that the majority of non-capital habeas cases are applied in a consistent manner.

To simply ignore these cases is to give the government a pass.

One final point, stretch that it may be. In other litigation contexts, relevant gathered facts on a particular subject in the control of one party, deliberately or even negligently misplaced by that party, and thus unavailable to the other party, are often construed against the offending party in favor of the non-offending party. *See United States v. Torres*, 845 F.2d 1165, 1169 (2d Cir. 1988) ("missing witness" instruction appropriate, permitting a jury to draw an adverse inference against a party failing to call a witness when the witness's testimony would be material and the witness is peculiarly within the control of that party.). In the missing witness context, it is more likely than not that the evidence would have been unfavorable to the party with such control of that witness, and a jury may reasonably draw such an inference. *See* 8 A James Wm. Moore, *et al.*, *Moore's Federal Practice* P 30.09[5] (2d ed. rev. 1995) ("*Moore's Federal Practice*"). And, in California the jury may be instructed that it may consider a defendant's concealment of evidence relating to a fact of importance as evidence tending to show consciousness of guilt. CALJIC 2.28. *But see, People v. Saucedo* (2004) 121 Cal.App.4th 937, (criticizing CALJIC No. 2.28, as an improvident instruction).

One must not lose sight of the fact that in Morales, the Ninth Circuit held that where it is impossible to tell from the texts of the orders why the California court decides some delayed petitions on the merits and rejects others as untimely; there can be no legitimate finding of adequacy:

> It is theoretically possible, we suppose, to reconcile and explain all of the California Supreme Court decisions entertaining on the merits or rejecting as untimely petitions that are three or more years old. Those divergent decisions may indeed represent consistent exercises of discretion rather than random applications of or exceptions to the timeliness rule. But we have no way of knowing whether that is the case. The California Supreme Court's denials of habeas petitions that Morales relies upon were accomplished by brief minute entries in what has been described as "post-card denial." *We can discern no apparent relationship between the time of delay and the findings concerning timeliness. Nor could Morales be expected to do so.*

Id. emphasis added.

Nor can petitioner or those of his ilk be expected to do so.

CONCLUSION

The only real conclusion that can be drawn from all of the forgoing is that the timeliness rule in California is inadequate. It is neither clear, nor consistently applied and respondent has failed to meet his burden of establishing that either is true.

DATED: October 15, 2008

Respectfully submitted,

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BRIEF FORMAT CERTIFICATION

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32)(A)(7)(B) because:

This Opening Brief contains 8,075 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and

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Dated: October 15, 2008

Respectfully submitted,

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STATEMENT OF RELATED CASES

As far as is known, this case is not related to any case on appeal.

DATED: October 15, 2008

/S/MICHAEL B. BIGELOW
Michael B. Bigelow

CERTIFICATE OF SERVICE BY CM/ECF

I hereby certify that on October 15, 2008, I electronically filed the foregoing with the clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED October 15, 2008

/S/MICHAEL B. BIGELOW
Michael B. Bigelow

08-15752

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES W. MARTIN,

Petitioner-Appellant,

v.

JAMES WALKER, Warden,

Respondents-Appelles.

On Appeal from the United States District Court
For the Eastern District of California

No. 2:99-CV-00223-WBS-GGH
The Honorable Gregory G. Hollows, Judge

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STATEMENT OF JURISDICTION

(a) The District Court for the Eastern District of California invoked its jurisdiction over the subject matter of this case pursuant to the provisions of 28 U.S.C. § 2254.

(b) Appellant Charles W. Martin is appealing the district court's final order of March 28, 2008, dismissing Appellant's petition for writ of habeas corpus. The district court's order entered judgment for the State and against Appellant. This appeal is brought upon issuance of a certificate of appealability filed by the district court on April 2, 2008, pursuant to 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1).

STATEMENT OF ISSUES

1. The certificate of appealability asks: Whether the burden has been met in proving that California's timeliness bar as set forth in, inter alia, *Clark/Robbins*[1] is clearly defined, well-established and consistently applied. (CR 112; ER 52.)

STATEMENT OF THE CASE

On December 19, 1994, amended complaint number 86F06757 was filed in Sacramento County Superior and Municipal Court. (CT 13-15.) The complaint charged Appellant, Charles Martin, with murder while engaged in a robbery and personally using a knife. (Cal. Pen. Code §§ 187(a); 190.2(a)(17); 12022(b).) Count two of the complaint further alleged that Appellant perpetrated a robbery while personally using a knife. (Cal. Pen. Code §§ 211 and 12022(b).)

Following the preliminary hearing on February 8, 1995, the amended complaint was

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[1] *In re Clark*, 4 Cal.4th 750 (1993) and *In re Robbins*, 18 Cal.4th 770 (1998).

Deemed to be an information, and Appellant pled not guilty and denied the special allegations. (CT 2.)

Trial by jury began on July 31, 1995. (CT 5, 33.)

On August 8, 1995, the court conducted a California Evidence Code section 402 hearing regarding Appellant's motion to exclude the testimony of Bonnie Permenter-Haywood. (CT 64.) After the hearing, the court denied the motion. (CT 64.)

On August 21, 1995, the jury found Appellant guilty of murder and robbery. The jury also found that Appellant committed the murder while engaged in the robbery and that Appellant personally used a knife during both crimes. (CT 6, 136-139.)

On September 18, 1995, the court sentenced Appellant to life in prison without the possibility of parole on count one plus a one-year consecutive term for the weapon use. (CT 6, 173-174.) Furthermore, the court stayed Appellant's sentence of the middle term of three years for count two with an additional year for the weapon enhancement. Appellant was awarded 489 days of pre-sentence custody credit after serving 327 actual days. Also, Appellant was ordered to pay a restitution fine of $5000. (CT 6, 173-174.)

Appellant filed a timely notice of appeal on October 19, 1995. (CT 175-176.) In his opening brief before the California Court of Appeal for the Third Appellate District, Appellant argued that the trial court erred by admitting Permenter's statements against him. On January 29, 1997, the Court of Appeal affirmed the judgment against Appellant. (ER 141-143, 145, 194-202.)

On March 10, 1997, Appellant filed a petition for review with the California Supreme Court. (ER 205-225.) Appellant presented the following issue: "Whether the Court of Appeal erred in upholding the trial court's admission of a witness's taped statement as past recollection recorded under Evidence Code section 1237, when the witness testified that she did not remember the underlying events and could not say affirmatively that her prior statements were

true." Appellant failed to include any reference to the federal Constitution or other federal authority. Review was denied on April 16, 1997, and became final on July 15, 1997. (ER 227.)

On February 19, 1998, Appellant filed a petition for writ of habeas corpus with the Sacramento County Superior Court. Appellant argued that he received ineffective assistance of both his trial and appellate attorneys. In addition, Appellant claimed that the trial court abused its discretion by dismissing the first jury pool. Moreover, Appellant asserted that the trial court erred by not instructing the jury regarding accomplice liability resulting from Permenter's conduct. (Respondent's July 18, 2000, motion to dismiss Ex. C.)

On May 19, 1998, the Sacramento County Superior Court denied Appellant's petition because his direct appeal was not then final and he had not shown that his appellate remedy was inadequate. (Respondent's July 18, 2000, motion to dismiss Ex. C.)

On June 19, 1998, Appellant filed a petition for writ of habeas corpus with the California Court of Appeal for the Third Appellate District. This petition closely mirrored the petition filed with the superior court and was denied on June 25, 1998. (Respondent's July 18, 2000, motion to dismiss Ex. D.)

On July 17, 1998, Appellant filed a petition for writ of habeas corpus with the California Supreme Court. Appellant continued to claim that his trial and appellate attorneys represented him deficiently. Specifically, Appellant claimed: "This case was based on a 1986 statement made by Bonnie Permenter. Had counsel researched and developed her case, this statement would have been excluded during the 402 hearing. . . . Counsel Huff failed to lay a foundation for exclusion of statement." (Sic.) Appellant further suggested that his attorney did not object to the statement at the 402 hearing. Appellant also complained that his attorney only objected twice

during the trial despite misconduct by the prosecution including: badgering and leading witnesses, engaging in ex-parte communications with the judge, misrepresenting facts to the jury, and meeting with defense witnesses during the lunch break. Appellant explained, "[t]he prosecution had a field day of hearsay and leading statements." Appellant continued to deride his counsel for her failure to move for exclusion of the wallet he dropped at the site where the victim's body was found. Appellant intimated that further investigation regarding palm and finger prints should have been conducted by the police, and that since it was not done, Huff should have objected. Appellant expressed concern that his attorney did not seem to care that Bobby Austin was never arrested. Appellant bemoaned the loss of three defense motions, claiming that his attorney failed to lay a foundation. Moreover, Appellant asserted that he gave his counsel a list of potential witnesses that were not called. Appellant claimed that his appellate counsel, ". . . failed to demonstrate Constitutional deprivations, Court error (except pertaining to the 1237 issue), prosecutorial misconduct, and abuse of discretion by the court." (Sic.) Appellant averred that these various errors prejudiced his trial, and "[w]ithout the illegal statement made by Permenter there would be no evidence to sustain the conviction." Appellant contended that the evidence not adduced at trial implicated Bobby Austin. Appellant further claimed that the trial court abused its discretion by: (1) admitting an unauthenticated recording into evidence; (2) allowing a chart prepared by the prosecution into jury deliberations; and (3) allowing the jury to use an unauthenticated recording. Appellant also reiterated his claim that it was error for the trial court to omit instruction regarding accomplice liability. (ER 229-239.)

On July 27, 1998, Appellant filed a motion seeking to add an additional ground to his state habeas petition. Appellant re-raised his claim that

the trial court erred by dismissing the first jury pool (ER 241-242.)

On January 27, 1999, the California Supreme Court denied the petition citing *In re Waltreus*, 62 Cal 2d 218, 225 (1965) and *In re Dixon*, 41 Cal 2d 756, 759 (1953). (ER 245.)

On February 4, 1999, Appellant filed his first petition for writ of habeas corpus with the federal district court. Appellant continued to attack the admissibility of Permenter's statements, his representation by both his trial and appellate counsel, and the fact that no instruction on accomplice liability was given. However, Appellant gave no specific examples of how appellate counsel failed him other than to claim that she raised only one issue and ignored errors. Appellant raised an additional claim that had not been presented to the California Supreme Court. Appellant claimed for the first time that the trial court failed to dismiss the robbery allegation. Appellant also argued that it was error for the trial court to dismiss the first jury pool. In addition, Appellant made no mention of any claim that his right to personal presence at a critical stage of the proceedings was abridged. (ER 283, CR 1.)

On January 31, 2000, Appellant filed a first amended petition. This petition raised seven claims: ineffective assistance of trial and appellate counsel, erroneous dismissal of the first jury pool, denial of right to confront witnesses because trial counsel waived; Appellant's right to be present, due process violations because his robbery and murder convictions were based upon insufficient evidence; denial of right to a fair trial because the trial court failed to give accomplice instructions. However, Appellant acknowledged that certain claims might not be exhausted. (See p. 15, fn. 1, and p. 18, fn. 2.) Appellant requested that he be allowed to file a second amended petition which contained greater factual specificity and a points and authorities following resolution of the exhaustion issue.

On March 1, 2000, the district court directed Appellant to file a second amended petition

containing only exhausted claims. The district court warned Appellant that if the second amended petition contained unexhausted claims, dismissal would be recommended. (ER 286; CR 26.)

On March 24, 2000, Appellant filed a second amended petition, notice of unexhausted claims, and another motion to stay proceedings. (ER 286; CR 28.)

On February 1, 2001, the district court issued findings and recommendations indicating that only Appellant's claims that it was error to dismiss the first jury pool and that it was error to omit a jury instruction on accomplice testimony were exhausted. Thus, the district court directed Appellant to file a third amended petition containing only those two exhausted claims. (Excerpts 96-103.)

On March 14, 2001, Appellant complied by filing a third amended petition which contained only the two previously exhausted issues. (ER 256-272.) On July 9, 2001, the district court ordered Appellant's federal habeas proceedings held in abeyance so that he could go back to the California Supreme Court and seek exhaustion of his other issues. (ER 278-279.)

Appellant filed his second California Supreme Court petition for writ of habeas corpus on March 18, 2002. Appellant claimed that his trial counsel was ineffective for failing to investigate witnesses and third party culpability. Appellant also attacked trial counsel for not stopping the admission of Permenter's taped statement. Appellant claimed that counsel should have presented the testimony of his trial expert, Dr. Swain, at the admissibility hearing. Appellant also faulted counsel for not noting obvious lies by Permenter at the admissibility hearing. Moreover, Appellant chastised counsel for not objecting to the admission of the transcript of Permenter's taped interview. In addition, Appellant claimed that his right to personal presence at a critical stage was abridged. Next, Appellant attacked the effectiveness of his state appellate counsel. Specifically, Appellant claimed that she failed to raise an issue complaining that the prosecutor

argued contradictory points related to the admission of the tape. Appellant also argued that appellate counsel failed to raise a claim that he was denied his right to confront Permenter due to her stated memory loss. Appellant asserted further that appellate counsel failed to raise a claim of insufficient evidence in the California Supreme Court upon direct review. (ER 63-149.)

The California Supreme Court denied this petition on September 11, 2002, with citation to *In re Clark*, 5 Cal.4th at 750 and *In re Robbins*, 18 Cal.4th at 770, 780). (ER 151.)

Appellant filed his fourth amended petition for writ of habeas corpus January 21, 2003. Appellant claimed that the trial court erred by dismissing the first jury pool. Appellant also faulted the trial court for failing to instruct the jury on accomplice testimony. Appellant claimed that he received ineffective assistance from trial counsel because she failed to investigate witnesses or present evidence of third party culpability. Appellant also attacked trial counsel for not effectively objecting to the admission of Permenter's taped interview. Appellant argued that it was ineffective not to present the testimony of Dr. Swain at the admissibility hearing. In addition, Appellant asserted that it was ineffective not to object to the admission of the transcript of the taped Permenter interview. Appellant argued further that he was deprived of his right to personal presence during a critical stage of the proceedings. Appellant alleged three bases of state appellate counsel's ineffectiveness. Appellant argued that appellate counsel failed to argue that the prosecutor raised contradictory points. Appellant also slighted appellate counsel for not raising a claim that his trial was fundamentally unfair because he was "absolutely unable to confront" Permenter. Finally, Appellant challenged appellate counsel's failure to argue insufficient evidence before the California Supreme Court upon direct review. (ER 152-192.)

On October 27, 2003, Appellee moved the district court for summary dismissal. Appellee

argued that the appellant's claim regarding his lack of presence at a critical stage and his claims of ineffective assistance by appellate counsel did not relate back to claims in the original federal petition and were therefore outside the AEDPA's one-year statute of limitations. Appellee argued further that Appellant's substantial delay in exhausting his additional claims via a second state high court habeas corpus petition should preclude federal review. Appellee also argued that all six of Appellant's claims were procedurally defaulted and should be dismissed. (ER 289; CR 50.)

On August 6, 2004, the district court issued Findings and Recommendations, recommending dismissal of Appellant's entire petition. (ER 289; CR 52.) The Magistrate concluded that only Appellant's original February 4, 1999, petition was timely under the AEDPA and that the claims in the fourth amended petition must relate back to those original claims in order to be timely. Next, the Magistrate found that two claims from the fourth amended petition did not relate back to the original petition, namely: claim 5 regarding Appellant's presence during the tape replay for the jury and claim 6 sub-theory 1 involving Appellant's claim that his appellate counsel was deficient for failing to argue error as a result of the prosecutor's use of inconsistent theories of admissibility for the Permenter statement. The Magistrate rejected the delay during exhaustion argument. However, the Magistrate found that all six of Appellant's fourth amended petition claims were procedurally barred. The Magistrate found that claims 1 and 2 were barred because they could have been raised before the state high court on direct appeal but were not. Next, the Magistrate concluded that Appellant's remaining claims, 3 through 6, were procedurally barred because they were not presented to the state high court in a timely fashion. The gist of the Magistrate's findings regarding the procedural bars was that Appellant had not made a sufficient specific factual allegation showing the state procedural bar

was inconsistently applied as required by *Bennett v. Mueller*, 322 F.3d 573 (9th Cir. 2003) to shift the burden back to Appellee.

Following this Court's opinion in *Felix v. Mayle*, 379 F.3d 612 (9th Cir. 2004), the Magistrate requested additional briefing on the relation back and statute of limitations question. Appellee acknowledged that the district court was bound to follow the precedent from its own circuit. However, Appellee posited that the Felix decision was wrongly decided. (ER 290; CR 59.)

On November 8, 2004, the Magistrate issued supplemental findings and Recommendations. The Magistrate withdrew his finding that claim 5 and claim 6, sub-theory 1, of the fourth amended petition should be time barred pursuant to Fed. R. Civ. P. 15(c)(2). The Magistrate concluded that the other procedural impediments remained valid and that Appellant's claims should all be dismissed as a result. (ER 290; CR 60.)

Appellant never challenged the procedural bar that was applied to dismiss claims 1 and 2 in his opposition to the motion for summary dismissal or his objections to the Magistrate's Findings and Recommendations. As a result, the oral argument held on March 7, 2005, was limited to a discussion of whether Appellant had challenged the adequacy of the timeliness bar that was applied to claims 3 through 6 sufficiently to shift the burden back to Appellee and the AEDPA statute of limitations issue. (ER 291; CR 66.)

On March 8, 2005, the district court ordered the motion for summary dismissal granted after finding that Appellant failed to assert specific factual allegations showing that the state procedure was inadequate. (ER 291; CR 67.)

On March 23, 2005, the district court issued a certificate of appealability. (ER 291; CR 71.)

On July 26, 2006, this Court decided the appeal after briefing and oral argument. This Court issued a Memorandum that ruled that the question of the timeliness procedural default was controlled by

King v. Lamarque, 464 F.3d 963 (9th Cir. 2006). (ER 53-55.) This Court remanded the matter to the district court advising that "the government must show that cases after *In re Clark*, [5 Cal.4th 750], had sufficiently clarified the rule and that it had been consistently applied." (ER 54.) This Court remanded only those issues contained in the fourth amended petition for writ of habeas corpus that were dismissed upon the basis of the *Clark/Robbins* timeliness bar, and it affirmed the dismissal of the other claims. (ER 31-32, 55.) Thus, claims three, four, and subparts two and three of claim six remained pending. (ER 32.)

On October 29, 2007, Respondent filed a motion to dismiss. (ER 294; CR 98; SER Tab 6.) On February 3, 2008, Appellant opposed the motion to dismiss. (ER 294; CR 101; SER Tab 5.) On February 14, 2008, Respondent replied to the opposition. (ER 294; CR 102; SER Tab 4.)

On February 21, 2008, a hearing was held on the motion to dismiss. (ER 1-28.) On March 10, 2008, the Magistrate Judge issued findings and recommendations recommending that the entire petition be dismissed. (ER 30-40.) The Magistrate Judge found that California's timeliness procedural bar had been sufficiently clarified and consistently applied since *In re Clark*, 5 Cal.4th at 750. (ER 30, 36, 39-40.)

Appellant filed objections to the Magistrate Judge's findings and recommendations on March 13, 2008. (ER 295; CR 105; SER Tab 3.) Respondent filed a reply to the objections on March 20, 2008. (ER 295; CR 106; SER Tab 2.) Appellant responded to the reply on March 25, 2008. (ER 295;CR 107; SER Tab 1.)

On March 28, 2008, the District Court ordered the Magistrate Judge's findings and recommendations adopted in full. Appellant's fourth amended petition for writ of habeas corpus was dismissed in its entirety, and judgment was entered for the state. (ER 41-42; CR 109.)

On March 28, 2008, Appellant filed a notice of appeal and a request for certificate of appealability. (ER 43-50.)

As noted above, the District Court issued a certificate of appealability on April 2, 2008. (ER 51-52.)

STATEMENT OF FACTS

A. Prosecution

In approximately late November 1986, Appellant had a conversation with his live-in girlfriend, Bonnie Permenter (RT 55-56), during which Appellant discussed killing a man with his friend Bobby Austin. (Corr. CT 2, 16-19; RT 163.) Appellant explained that he and Austin discussed killing a man who had money and drugs. (Corr. CT 16-19, 36.)

Approximately two weeks later Appellant showed up at his Isleton home (RT 56-57) with about $1,000 and one-half ounce of methamphetamine. (Corr. CT 17-20, 36, 41; RT 164.) While Permenter was unsure of the exact dates and times, she believed that Appellant returned with the money and drugs on Friday, December 5, 1986. (Corr. CT 20, 21, 22, 31, 42; RT 158.) Appellant told Permenter that all he did was hit the guy in the back of the head and rob him. (Corr. CT 20-21, 36; RT 158.) Appellant also told Permenter that he split the money and drugs with Austin. (RT 164.)

On Saturday, December 6, 1986, at about 9:00 a.m. Appellant told Permenter he was going to Austin's. (RT 159.) That afternoon Appellant returned (RT 159), and Permenter noticed a five or five and one-half foot box in the back of Appellant's vehicle. (RT 76.) He told her it contained tools, but Permenter suspected that a body was in the box. (Corr. CT 27, 31, 42.)

On Saturday at approximately 11:00 p.m., Appellant went fishing on the Sacramento River Delta near his home. (Corr. CT 3.) Early Sunday

(December 7, 1986) morning Appellant phoned Permenter and explained that he had gotten his car stuck in the sand at the river. (Corr. CT 3; RT 160.) Permenter drove out to the river and tried to help Appellant free the stuck vehicle. (Corr. CT 23; RT 161.) They tried roping the bumper of the stuck car to the car Permenter drove, and Appellant tried kicking wood under the tires; however, they were not successful in freeing the vehicle. (Corr. CT 25, 38; RT 161.) Appellant told Permenter that the box had broken, and he explained that there were things in there that he needed to get rid of. (Corr. CT 37.) Next, Appellant and Permenter drove home to summon a tow truck. (Corr. CT 25; RT 161.)

Appellant was panicky and fidgety while they waited for the tow truck. (Corr. CT 31, 38; RT 161.) At approximately 5:30 a.m. Permenter took Appellant back out to his car where the tow truck was waiting. (Corr. CT 5-6.) She dropped Appellant off, and she ran errands the remainder of the day. (Corr. CT 6, 8, 11.) Permenter saw Appellant various times on Sunday (Corr. CT 10; RT 161), however, Appellant subsequently disappeared. Permenter did not see him again until they met up in Illinois several months later. (Corr. CT 12; RT 84-86, 162.)

On December 7, 1986, Nathan Hall was playing near the Sacramento River Delta with some friends. (RT 194-198.) Hall found appellant's wallet. (RT 121, 178, 199, 217, 229-230, 252, 422-423.) He also saw a plywood box, that resembled a coffin, and a large plastic bag in the same area. (RT 139, 201-205, 222.) The bag contained the corpse of Charles Stapleton. (RT 93, 118, 151, 206-207, 239, 421.)

Police officers responded to the scene and found a depression in the sand which contained boards similar to those used for the box. (RT 111, 141.) The officers thought that the depression was either a partial grave or a mark from a car tire. (RT 113.) Furthermore, the plywood box had blood stains in it. (RT 117, 146-147, 425, 442.) Moreover, even though the victim was known to carry large sums of

money (RT 100, 572-573), no wallet or cash was discovered on the victim. (RT 238, 297.)

On December 8, 1996, pathologist Dr. Gary Stuart conducted an autopsy on the victim. (RT 287-288.) Stuart was of the opinion that the victim had been dead approximately one to two days. (RT 298-301.) Stapleton suffered numerous wounds which would have been fatal by themselves, including: a very forceful skull fracture (RT 307), a stab wound to the jugular vein (RT 312), a stab wound to the aorta (RT 319-320), and a stab wound which damaged the left lung (RT 320).

Later, officers discovered two Cadillacs belonging to the victim at Austin's home. (RT 170.) The officers were unable to locate Appellant until he was arrested in Hernando County Florida on October 24, 1994. (RT 449, 452.) On November 3, 1994, Appellant was brought back to Sacramento County. (RT 449.)

B. Defense

Dr. Susan Garcia-Swain testified that long-term methamphetamine and alcohol use such as that reported by Permenter could affect one's memory. (RT 478-479, 481, 483-484.)

In addition, Paulette LaMontague, a friend of Appellant, testified that she and Permenter drank alcohol and used drugs together in 1986. (RT 525-530.)

Also, Charise McGill testified that she was a friend of the victim's, and she believed that the victim called her on December 5, 1986 at 11:08 p.m. (RT 544, 572-573.)

SUMMARY OF ARGUMENT

The federal District Court's order dismissing Appellant's federal habeas petition as procedurally barred should be affirmed. The District Court correctly concluded that California's timeliness bar has been established as sufficiently clarified and

consistently applied since the California Supreme Court decided *Clark* in 1993.

STANDARD OF REVIEW

This Court reviews the district court's dismissal of a petition for writ of habeas corpus de novo. *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991); *United States v. Brian N.*, 900 F.2d 218, 220 (10th Cir. 1990); *Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999). To the extent that findings of fact are challenged, the clearly erroneous standard applies. *Thomas v. Brewer*, 923 F.2d 1361, 1364 (9th Cir. 1991).

Claims that were not raised in the district court are not cognizable on appeal. *Belgarde v. State of Montana*, 123 F.3d 1210, 1216 (9th Cir. 1997).

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED APPELLANT'S FEDERAL PETITION, CLAIMS 3 THROUGH 6, AS PROCEDURALLY BARRED

Appellant and Amici Curiae argue that the state has failed to demonstrate that California's timeliness bar has become sufficiently clear and consistently applied to bar federal review of such defaulted claims and that the District Court erred in holding as such. (AOB 13-39; Amici "ACOB" 1-28.) They are both mistaken.

Federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). If the court finds an independent and adequate state procedural ground, federal habeas review is barred unless the prisoner can demonstrate cause for the procedural default and actual prejudice, or demonstrate that the failure to

consider the claims will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 750. Appellant is not now advancing any claim of cause and prejudice or fundamental miscarriage of justice. (AOB 13-39.)

In order to preclude federal review, the state procedural rule must have been sufficiently clear at the time of the default so as to have put the petitioner on notice of what conduct was required. *Bargas v. Burns*, 179 F.3d 1207, 1212 (9th Cir. 1999). In addition, the state procedural rule must also have been well-established. That does not mean, however, that the state court must "locate a case law citation that speaks to the very same factual scenario as the one before it prior to invoking the rule of procedural default," (*Id.* at 1212) nor is a state court required "to articulate every permutation of every rule before it can invoke procedural. . . ." hurdles. *Id.* at 1213.

In *Bennett*, this Court confronted the independence and adequacy of California's untimeliness bar. With respect to independence, the court held that state court decisions imposing an untimeliness bar rendered after *In re Robbins*, 18 Cal.4th at 770, are independent of federal law. *Bennett v. Mueller*, 322 F.3d 573, 582-83. In addressing the adequacy prong, this Court preliminarily turned to the question of burdens:

> [T]he ultimate burden of proving adequacy of the California bar is upon the State of California. . . .Once the state has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense, the burden to place that defense in issue shifts to the petitioner. The petitioner may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule. Once having done so, however, the ultimate burden is the state's.

Bennett, 322 F.3d at 586.

In reaching this result, the *Bennett* court relied heavily on the Tenth Circuit's decision in *Hooks v. Ward*, 184 F.3d 1206 (10th Cir. 1999). There, the court explained that

> [o]nce the state pleads the affirmative defense of an independent and adequate state procedural bar, the burden to place the defense in issue shifts to the petitioner. This must be done, at a minimum, by specific allegations by the petitioner as to the adequacy of the state procedure. The scope of the state's burden of proof thereafter will be measured by the specific claims of inadequacy put forth by the petitioner.

Hooks, 184 F.3d at 1217, quoted by *Bennett*, 322 F.3d at 584-85.

This Court noted that for purposes of demonstrating adequacy, case precedent suggests any review of state court orders "should be limited to the language of the state court opinions." *Bennett*, 322 F.3d at 584 (citing *Valerio v. Crawford*, 306 F.3d 742, 774-75 (9th Cir. 2002) (en banc); *Calderon v. United States Dist. Court (Bean)*, 96 F.3d 1126, 1131 (9th Cir. 1996).) But the *Bennett* Court was careful to point out that circuit authority had not previously decided the issue, and it would not do so at that time. *Bennett*, 322 F.3d at 584.

Under *Bennett*, the first step is to determine whether the state has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense. *Bennett*, 322 F.3d at 586. There is no question that Respondent satisfied this preliminary burden. Therefore, the burden shifted to Appellant to place the defense in issue by "asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating

inconsistent application of the rule." *Bennett*, 322 F.3d at 586. The scope of the state's burden of proof is "measured by the specific claims of inadequacy put forth by the petitioner." *Bennett*, 322 F.3d at 584-85 (quoting *Hooks*, 184 F.3d at 1217).

Appellant argued in his opposition to the motion to dismiss that the state's timeliness rule was "inadequate because it is neither well established nor consistently applied." (SER Tab 5, 17.) Appellant also argued that he "need do no more than demonstrate the existence of a genuine factual dispute regarding consistency." (SER Tab 5, 17.) This bare pleading argument shifted the burden back to the state to establish the adequacy of the timeliness bar. *King v. Lamarque*, 464 F.3d at 963, 967. However, it is important to remember that the state's ultimate burden is measured by the burden shifting efforts by appellant. *Hooks*, 184 F.3d at 1217, quoted by *Bennett*, 322 F.3d at 584-85.

A. Clearly Defined and Well Established

In order for a state procedural bar to be adequate, three aspects are important. The bar must be clearly defined in state law, the bar must be well established at the time it was applied, and the bar must be regularly used by the state courts. *Coleman*, 501 U.S. at 729; *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991); *Poland v. Stewart*, 169 F.3d 573, 577 (9th Cir. 1999).

California describes its timeliness bar as follows:

> Pursuant to policies adopted by this court in June 1989, a habeas corpus petition is not entitled to a presumption of timeliness if it is filed more than 90 days after the final due date for the filing of appellant's reply brief on the direct appeal. In such a case, to avoid the bar of untimeliness with respect to each claim, the petitioner has

the burden of establishing (i) absence of substantial delay, (ii) good cause for the delay, or (iii) that the claim falls within an exception to the bar of untimeliness.

Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim. A petitioner must allege, with specificity, facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time. It is not sufficient simply to allege in general terms that the claim recently was discovered, to assert that second or successive post conviction counsel could not reasonably have discovered the information earlier, or to produce a declaration from present or former counsel to that general effect. A petitioner bears the burden of establishing, through his or her specific allegations, which may be supported by any relevant exhibits, the absence of substantial delay.

A claim or a part thereof that is substantially delayed nevertheless will be considered on the merits if the petitioner can demonstrate good cause for the delay. Good cause for substantial delay may be established if, for example, the petitioner can demonstrate that because he or she was conducting an ongoing investigation into at least one potentially meritorious claim, the petitioner delayed presentation of one or more other known claims in order to avoid the piecemeal presentation of claims, but good cause is not established by prior counsel's asserted uncertainty about his or her duty to conduct a habeas

> corpus investigation and to file an appropriate habeas corpus petition.
>
> A claim that is substantially delayed without good cause, and hence is untimely, nevertheless will be entertained on the merits if the petitioner demonstrates (i) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner, (ii) that the petitioner is actually innocent of the crime or crimes of which he or she was convicted, (iii) that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death, or (iv) that the petitioner was convicted or sentenced under an invalid statute. When we apply the first three of these exceptions, we shall do so exclusively by reference to state law. When we apply the fourth exception, we apply federal law in resolving any federal constitutional claim.

In re Robbins, 18 Cal. at 780-81.

This Court has explained that the precise capital habeas standards regarding presumed timeliness recited above do not apply to regular habeas cases. *Bennett v. Mueller*, 322 F.3d at 583. However, it is well chronicled that the rest of the policies apply in principle and in actuality to non-capital habeas litigants. The California Supreme Court has expressly stated as much:

> The [capital case] Policies [footnote 18 omitted] did not create or modify the timeliness requirements applicable to all habeas corpus petitions except insofar as

> they (1) establish a presumption of timeliness if a petition by a capital defendant is filed within 90 days of the final due date for the filing of an appellant's reply brief (Policies, std. 1-1.1); and (2) take into account this court's decision in *In re Stankewitz*, []40 Cal.3d 391 [(1985)], when evaluating the timeliness of a habeas corpus petition in a capital case (Policies, std. 1-1.3).

In re Clark, 5 Cal.4th at 783 (emphasis added); *see also In re Sodersten*, 146 Cal.App.4th 1163, 1222 (2007). Otherwise, it would make no sense for the California courts to cite the cases of *Robbins* and/or *Clark* which are both capital cases when ruling on the timeliness of ordinary habeas petitions. Such rulings happen in California many hundreds of times per year, and such a ruling occurred in this case.[2] Since the California high court asserts that capital habeas time standards generally apply to non-capital habeas cases, this Court should not determine that the state supreme court is incorrectly citing its cases under state law. Appellant's claim that it is improper to use capital cases in analyzing the state's timeliness standard (AOB 20) is just wrong. Respondent does not understand how the state high court could be any more clear when it asserts that the state's timeliness standards (save for two exceptions not applicable here) apply to all habeas corpus filings. *In re Clark*, 5 Cal.4th at 783 (emphasis added); see also *In re Sodersten*, 146 Cal.App.4th at 1222.

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[2] Appellant asserts that since 2002, the state high court issues approximately 2,763 silent denials to habeas corpus cases per year. On average, the state high court cites *Clark*, *Robbins*, or both about 703 times per year or approximately 25 percent. (AOB 31-32.) Common sense tells us that the majority of these citations are to non-capital cases.

Furthermore, this Court has not had any difficulty in analyzing a non-capital habeas procedural bar question utilizing the *Clark* holding in *Bennett*. The entire framework of the *Bennett* analysis was to establish a methodology to ascertain the adequacy of the *Clark* procedural bar for non-capital habeas cases. Simply put, this Court's opinion in *Bennett* would not make any sense if *Clark* was wholly inapplicable to non-capital habeas litigations.

Therefore, this Court should find that use and citation of the *Robbins/Clark* bar is well established for non-capital habeas petitions.

Also, California's time bar is clearly defined. This Court in *Bennett* easily boiled the state's time bar down to its core: "Significant, unjustified delay in presenting habeas corpus claims to California state courts will bar consideration of the merits of the claim." *Id.* at 581. "Delay 'is measured from the time the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis of the claim'" *Id.* (citing *Clark* and *Robbins*). Within the clarity analysis, it is important to note the extreme similarity to a triggering date within the AEDPA statute of limitations: "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Since this idea of mandating due diligence can be readily understood in federal practice, it is sufficiently clear for state habeas litigants.[3]

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[3] Appellant argues that the similarities between the state and federal system end at the triggering date because the federal system then provides for a one year time limit. (AOB 23-24) However, based upon both statutory and equitable tolling, the federal system's time limits are not as exact as Appellant would have this Court believe.

Appellant argues that the state's reliance upon *Clark* to clarify California's timeliness rule is misplaced because the state was required by this Court's remand to establish clarity since *Clark*. (AOB 20-21.) This position is incorrect. *Morales v. Calderon*, 85 F.3d 1387 (9th Cir. 1996) is a pre-*Clark* case. The petitioner in *Morales* received a timeliness denial a few days before *Clark* was issued, and the court expressly stated that it was offering no opinion about whether *Clark* had sufficiently clarified the issue. *Morales v. Calderon*, 85 F.3d at 1391. As such, Appellant is mistaken that *Morales* precludes the use of *Clark* to add to the clarity equation.

In addition, the state clearly explains the method for habeas petitioners to justify their delay and the possible exceptions to the rule which forgive a lack of diligence. State courts are free to clarify their procedural rules, and such clarification does not change the bar, but merely propounds it more cogently. The fact that previous explanations of a bar were less succinct does not mean the bar was not previously upheld. *Alley v. Bell*, 101 F.Supp.2d 588, 626 (W.D. Tenn. 2000).

The California Supreme Court has gone to great lengths to clarify the untimeliness rule. Claims in a habeas petition must be timely filed. *In re Robbins*, 18 Cal.4th at 778. A petitioner can avoid the untimeliness bar by showing: (1) absence of substantial delay; (2) good cause for the delay; or (3) the claim falls within an exception to the untimeliness bar. *Id.* at 780. A petitioner cannot meet his burden of establishing an absence of "substantial delay" by allegations in general terms that information was recently discovered. *In re Gallego*, 18 Cal.4th 825, 832-33 (1998). This sort of deficiency is not cured by a declaration from present or former counsel to the same general effect. *Id.* at 832-33.

The absence of substantial delay must be alleged "with specificity, facts showing when information offered in support of the claim was obtained, and that the information was neither

known, nor reasonably should have been known, at an earlier time. . . ." *In re Gallego*, 18 Cal.4th at 833; *In re Robbins*, 18 Cal.4th at 780, 787-88, n. 10. Relevant exhibits should be proffered in support of the specific allegations in order to establish the absence of substantial delay. *In re Robbins*, 18 Cal.4th at 795, n. 16. The requirement of specificity is not met merely by generally incorporating by reference all of the facts set forth in exhibits accompanying the petition. Petitioners must clearly present, with appropriate references to, and descriptions of, any supporting exhibits, concerning when information offered in support of each claim and subclaim was obtained, was known, and reasonably should have been known. *In re Gallego*, 18 Cal.4th at 832-33; *In re Robbins*, 18 Cal.4th at 795, n. 16.

Claims relying exclusively on the appellate record reasonably should have been known to counsel at that time. *In re Gallego*, 18 Cal.4th at 838; *In re Robbins*, 18 Cal.4th at 814. It is not incumbent upon respondent to allege in its opposition what petitioner and/or his counsel knew with respect to a particular claim, or when they should have known it. It is the petitioner who "must 'get down to details.'" *In re Gallego*, 18 Cal.4th at 837.

A petition must be filed "as promptly as the circumstances allow." Delay in seeking habeas relief is measured from the time a petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim. *In re Robbins*, 18 Cal.4th at 780, 787.

If a petitioner is conducting a bona fide ongoing investigation, based on triggering facts, into a claim or claims, other completed claims can be withheld in order to avoid piecemeal presentation of claims. *In re Gallego*, 18 Cal.4th at 838, n. 13; *In re Robbins*, 18 Cal.4th at 805-06, n. 28. However, when there is no "bona fide investigation into other potentially meritorious claims," then a petition advancing the known claims must be presented

promptly. *In re Gallego*, 18 Cal.4th at 834; *In re Robbins*, 18 Cal.4th at 805-06.

An exception will be made for an unjustifiably delayed petition if the petitioner can show that the conviction and/or sentence being challenged. constitutes a fundamental miscarriage of justice. A fundamental miscarriage of justice is shown by establishing one of the following: (1) an error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (2) the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (3) the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it, that absent the trial error or omission, no reasonable judge or juror would have imposed the sentence of death; or (4) the petitioner was convicted or sentenced under an invalid statute. *In re Robbins*, 18 Cal.4th at 780-81. The first three exceptions are determined exclusively by an application of state law. Federal law is applied to the fourth exception, whenever a federal constitutional claim is being resolved. *In re Robbins*, 18 Cal.4th at 812, n. 32. With the exception of the excuse that pertains solely to the death penalty, the exceptions are general and apply to all cases. Admittedly, the analysis of timeliness in California requires a case specific approach, however, such a consideration is not a valid reason to conclude that the bar is not clear. Other rules involving timeliness take a similar approach. See e.g. AEDPA statute of limitations rulings addressing the concept of equitable tolling such as *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) ("Determining whether equitable tolling is warranted is a 'fact specific' inquiry." And see *Wood v. Hall*, 130 F.3d 373, 376 (9th Cir. 1997) (a state rule of law that involves discretion is not necessarily unclear).

To summarize, since this Court could clearly distill the state's time rule with ease in *Bennett*, like the many state court decisions on the topic,

Respondent urges this Court to find the rule clear.

Appellant and Amici argue that the state has done nothing to explain what constitutes "substantial delay." (AOB 19-20; ACOB 4-5.) The rule has been made especially clear for persons in the same position as Appellant, namely those petitioners who are filing second California Supreme Court habeas petitions after more than four years of delay since their high court direct appeals became final. By way of review, Appellant's direct appeal became final on July 15, 1997. He filed his first state high court habeas petition on July 17, 1998, and he filed his second state high court habeas petition on March 18, 2002. Thus, Appellant filed his untimely state high court petition more than four years and six months after his direct review became final. The state high court has provided a concrete example of what constitutes "substantial delay." The state high court declared in no uncertain terms that a delay of three years and five months was substantial. *In re Sanders*, 21 Cal.4th 697, 702, 705 (1999). To the extent that Appellant claims that Sanders "did nothing to shed light on what in fact constitutes substantial delay," (AOB 19) he is flat wrong.

It is important to note that the claims Appellant raised in his second state high court petition pertained to matters stemming from his 1995 trial and his 1997 petition for direct review in the state high court. As such, Appellant could not claim on March 18, 2002, that his claims were newly discovered. That Appellant understood his duty to explain his substantial delay is evidenced by his effort to explain his delay in his second high court petition. Appellant posited that he acted with diligence in preparing the writ petition and that the People would not suffer any prejudice. (ER 76.) However, as noted above, Appellant was clearly informed by *Gallego* and *Robbins* that general statements of diligence were inadequate to explain substantial delay. *In re Gallego*, 18 Cal.4th at 832-833; *In re Robbins*, 18 Cal.4th at 787-788 n. 10, 795 n. 16.

California courts have provided other examples of what constitutes substantial delay. *In re Jones*, No. G013963 a Court of Appeal, Fourth District case decided on July 27, 1994, (unpublished) provided in a non-capital case that a 14 year delay required justification, and claim that he did not learn about the issue and was not put on notice of the issue failed to explain why he did not examine his sentence for errors at the time it was imposed. Previously published *In re Jones*, 26 Cal.App.4th 1759 (1994). *In re Miller*, No. B186447 a Court of Appeal, Second District case decided on July 17, 2006, (unpublished) provided in another non-capital case that a 30 month delay was substantial. *In re Miller*, 2006 WL 198035 *1,3 (Cal.App.2006). *In re Tsaturyan*, No. B156012 a Court of Appeal, Second District case decided on July 23, 2002, (unpublished) provided in a non-capital case that 16 months was far too long. *In re Tsaturyan*, 2002 WL 1614107 *1,3 (Cal.App. 2002). As such, Appellant had several sources for concrete examples of unacceptable delay.

Appellant now argues for the first time on appeal, that contract provisions and the rules of lenity and lack of notice undermine the clarity of the state's timeliness rule. (AOB 24-27.) Ordinarily, new legal theories raised for the first time on appeal should not be entertained by the reviewing court. *Guillory v. Orange County*, 731 F.2d 1379, 1383 (9th Cir. 1984); *Moran v. Aetna Life Ins. Co.*, 872 F.2d 296, 300 (9th Cir. 1989). These new theories that were not advanced in the district court and should be rejected here. In any event, Appellant, was presenting his second state high court habeas petition well over four years after his direct review was final and was told that three years and five months was substantial delay. *In re Sanders*, 21 Cal.4th at 702, 705. There was not doubt by the time Appellant filed his untimely state habeas petition in 2002, that delays of more than three years and five months were substantial and in need of justification. Appellant was clearly on notice.

Appellant and Amici also complain that good cause to justify delay has not been adequately defined. (AOB 21, 26; ACOB 10.) Respondent urges a conclusion that just because a timeliness determination is inexact does not make the rule unjust. Exactly the opposite is true. A fixed timeliness rule with specifically delineated excuses could have the effect of precluding review unjustly. California has fairly chosen an individualized, case-by-case assessment of the claim or claims, the evidence supporting the claim and the timing and circumstances of the discovery of the factual basis for each claim. Admittedly, whether a particular claim will be considered untimely depends on the particular nature of the claim and the investigation leading to discovery of the claim. But any claimed ambiguity necessarily stems from a flexible rule along with the very honest realization by the California Supreme Court that some claims take longer to develop than others, and that some cases are impacted by individualized circumstances to varying degrees. Balancing the proffered justification against the length of the delay with an eye toward the type of claim and investigation needed to develop it provides a vastly more fair system than arbitrary lines in the sand.

Also concrete examples of proper justification exist. The *Sanders* opinion explains that abandonment by counsel constituted good cause for the delayed presentation of claims in that case. *In re Sanders*, 21 Cal.4th at 702-723. *In re Scott*, No. B165619 a Court of Appeal, Second District unpublished case decided on October 2, 2003, provided,

> The Director's failure to set forth a factual showing to counter Scott's reasons for delay arising from the unavailability of his property due to such transfers, the constant prison lockdowns, and denial of access to the prison law library amounts to a concession that such reasons are valid and adequate. Moreover, the Director has

> failed to claim and substantiate any prejudice accruing from any delay in Scott's seeking administrative or judicial review. Accordingly, we conclude Scott's claims are not barred as untimely.

In re Scott, 2003 WL 22272576 *1, 3-4 (Cal.App. 2003).

Also, as noted above, litigants who are pursuing additional claims in good faith are justified in delaying to avoid piecemeal litigation. *In re Gallego*, 18 Cal.4th at 838, n. 13; *In re Robbins*, 18 Cal.4th at 805-06, n. 28.

In any event, Appellant should be precluded from claiming here that he did not understand what types of justification for his delay would be appropriate. It was incumbent upon Appellant to proffer the actual reasons for his delay, and not to conjure up some false but previously accepted justification. Furthermore, California cases have made it abundantly clear that offering justifications for delay in general terms like Appellant did below ("acted with diligence in preparing the instant writ petition" ER 76) is not sufficient. *In re Gallego*, 18 Cal.4th at 832-833; *In re Robbins*, 18 Cal.4th at 787-788 n. 10, 795 n. 16.

B. Consistent Application

There is currently no specific guidance[5] for the state upon the question of exactly how to meet the ultimate burden of demonstrating that the state's time bar is consistently applied. However, a review of both published and unpublished reasoned

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[5] Respondent notes that generally, the state raises the procedural default issue in its answer, and petitioners challenge the adequacy of the state bar in their traverse. Respondent questions what type of pleading or proper method of presentation a state should utilize to carry its ultimate burden.

(continued)

decisions demonstrates that California consistently applies its time bar rule.[6] *Powell v. Lambert*, 357 F.3d 871, 879 (9th Cir. 2004) (courts may consider unpublished reasoned decisions in addition to reasoned published decisions); *Bennett*, 322 F.3d at 584 (citing *Valerio v. Crawford*, 306 F.3d at 774-75) (review limited to the language of state court decisions). It is critical to remember that this Court and the United States Supreme Court have placed emphasis upon the idea that procedural bars have important constitutional supports under them. *Bennett*, 322 F.3d at 582. State procedural rules "are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997). Such important issues should not be readily dismissed by the use of a burden of proof upon the state that is impossible to carry or lacks reason.

A procedural default will be found to have been consistently applied if the actual application of the default rule to all similar claims has been even-handed "in the vast majority of cases." *Moran v.*

(continued)

Unless the state is routinely afforded the opportunity to file an amended answer or allowed to offer some additional evidentiary and case authority presentation, the state cannot ever meet its ultimate burden.

[6] Respondent has abandoned the surgery of silent denials proffered in the District Court for the sound reasons offered by that Court, namely, a review of silent denials simply requires too much speculation to be useful to answer the inquiry. (ER 36-38.)

McDaniel, 80 F.3d 1261, 1270 (9th Cir. 1996); *Dugger v. Adams*, 489 U.S. 401, 410-412 n. 6 (1989). Failure to impose a bar in a given case does not mean that the bar is not invoked in the vast majority of cases. *Shumway v. Payne*, 223 F.3d 982, 989 (9th Cir. 2000). Furthermore, application of a set of exceptions to a bar does not make it irregularly imposed. *Hale v. Gibson*, 227 F.3d 1298, 1330, 1331 n. 15 (10th Cir. 2000).

It would be difficult to explain with any logic a justice system in which jurors are presumed to follow the law as delivered to them in the instructions, (*United States v. Heredia*, 483 F.3d 913, 923 (9th Cir. 2007) (en banc)), and yet an opposite presumption that state courts are not adhering to their established state laws. Such a presumption is contrary to the law and common sense. Simply put, California courts routinely must follow the edicts from their state high court. *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455 (1962).

The California Supreme Court has consistently stated in strong terms in its published opinions the requirement to use the timeliness bar. *In re Clark*, 5 Cal.4th at 750; *In re Robbins*, 18 Cal.4th at 770; *In re Gallego*, 18 Cal.4th at 825; *In re Sanders*, 21 Cal.4th at 703-705; *In re Hamilton*, 20 Cal.4th at 273, 283, n. 5 (1999). These decisions are clear, reasoned, and educating. There is nothing in this body of case law that suggests any inconsistencies.

Moreover, several published and unpublished lower court decisions also address the *Robbins/Clark* time bar. These cases further establish that the state's time bar is consistently applied. *In re Crockett*, 159 Cal.App.4th 751 (2008); *In re Sodersten*, 146 Cal.App.4th at 1220-22; *In re Bittaker*, 55 Cal.App.4th 1004, 1012, n. 3 (1997); *People v. Senior*, 33 Cal.App.4th 531, 537-38 (1995); *In re Little*, 2008 WL 142832 (Cal.App. 2008); *People v. Millsap*, 2007 WL 3173572 *2 (Cal.App. 2007); *In re Navas*, 2006 WL 3604350 *3, 4-5 (Cal.App. 2006); *People v. Pulley*, 2006 WL 2501448 *6 (Cal.App. 2006); *People v. Fairbanks*, 2006 WL 950267 *2-3 (Cal.App. 2006);

Cooper v. Superior Court, 2005 WL 3507993 *6-7 (Cal.App. 2005); *People v. Molotla*, 2004 WL 1068840 *7 (Cal.App. 2004); *People v. Pineda-Duque*, 2003 WL 23002734 *1 (Cal.App. 2003); *In re Scott*, 2003 WL 22272576 *3-4 (Cal.App. 2003); *People v. Drews*, 2003 WL 42550 (Cal.App. 2003) (coram nobis). The consistency of use of California's timeliness bar is thereby established. See also, *In re Gov*, 2006 WL 1987801 *1, 10 n. 17 (Cal.App. 2006); *In re Cobos*, 2009 WL 162060 *1, 11 (Cal.App. 2009); *In re White*, 121 Cal.App.4th 1453, 1456 (2004); *In re Anderson*, 1996 WL 14022 *1 (Cal. 1996); and *In re Drews*, 2003 WL 42515 *1-2 (Cal.App. 2003).[7]

Since the burden shifting efforts by Appellant in this case consisted merely of pleading the inadequacy of the state's timeliness rule (SER Tab 5, 17), the efforts by the state both here and in the district court, clearly carry the state's ultimate burden, since that burden is to be measured against the burden shifting efforts by Appellant. *Bennett*, 322 F.3d at 584-85 (quoting *Hooks*, 184 F.3d at 1217).

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[7] In addition, superior courts routinely cite to *Clark/Robbins* in the disposition of superior court habeas proceedings. However, no viable method to search that body of cases has been devised to date.

Appellant merely plead that the rule was inadequate, while Respondent has now shown by specific factual citations that the rule is indeed adequate.

Appellant proffers his own survey of silent denials and posits that the state high court does not bar habeas matters upon timeliness grounds a majority of the time. (AOB 31-33.) Appellant's survey tells us nothing because it requires rank speculation to draw any conclusion. Appellant makes no effort to articulate the relative delay of any of the cases in his survey. Likewise, he fails to posit whether any petition within his survey articulated justifications, such as continuing investigation of additional claims in good faith, abandonment by counsel or loss of access to legal materials through no fault of the petitioner. It is this need to resort to speculation that makes Appellant's survey of no use here. In addition, the state need not show that the bar is imposed a majority of the time generally, but rather that the bar is applied even handedly when the circumstances support it. *Moran v. McDaniel*, 80 F.3d at 1270; *Dugger v. Adams*, 489 U.S. at 410-412 n. 6; *Shumway v. Payne*, 223 F.3d at 989.

Appellant also attacks the states's practice of issuing silent denials and argues that these cases should be counted against the state. (AOB 33-36.) Not so. As noted above, nothing can be gleaned from these denials. Furthermore, the California Courts address a ridiculous number of state habeas corpus petitions in all three levels of judicial review (superior court, court of appeal, and state high court). To require California to issue explicated decisions upon each and every petition, no matter how frivolous, would bring the judicial system in California to a grinding halt. Furthermore, it would be an indefensible judicial system in which jurors are presumed to follow their jury instructions, while California courts are presumed not to follow the clear edicts of the state high court when they are duty bound to do so. *United States v. Heredia*, 483 F.3d at 923; *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d at 455. Appellant's suggestion that the

California courts should be required to issue explicated decisions upon every habeas corpus filing or suffer a penalty for failure to do so, is simply untenable.

Respondent asserts that the use of a silent denial with respect to a petition which is both untimely and patently meritless does not advance the case for inconsistent application. Indeed, a silent denial is particularly appropriate if the timeliness question is complex and the meritless nature of the petition is plain. Such a conclusion has long been supported by the analogous proposition that courts may address a claim of ineffective assistance of counsel by resolving the prejudice issue when the question of deficient performance is complicated. The United States Supreme Court has held,

> there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Strickland v. Washington, 466 U.S. 668, 697 (1984). Likewise, when the state high court is faced with a petition that is both patently meritless and potentially untimely, but the untimeliness question is complicated, the court should be permitted to deny the petition on the easier basis without suffering a finding of inconsistency.

Based upon this analysis, Respondent argues that the only factual scenario which would support a finding of inconsistent application of the state's time bar would be for the state high court to grant relief upon a habeas petition that was filed after substantial unexplained delay. Respondent is unaware of any habeas corpus petition that was presented after substantial delay in which relief has been granted.

Appellant's parting shot argues that a litigant in possession of facts who "deliberately or even negligently misplace[s]" that information, should suffer an adverse consequence as a result. (AOB 37.) Appellant candidly admits that this argument might be a stretch. (AOB 37.) This new legal theory was not raised in the district court and it should be rejected here. *Guillory v. Orange County*, 731 F.2d at 1383; *Moran v. Aetna Life Ins. Co.*, 872 F.2d at 300. In addition, there is no basis to suggest that the published and unpublished court decisions in California are in the "possession" of Respondent. These explicated decisions are available equally to both parties. That Appellant chose to eschew citations to actual cases in support of his mere pleading efforts to demonstrate inadequacy is not in any way the fault of Respondent. No negative consequence to the state is appropriate here.

Respondent respectfully requests that this Court affirm the District Court's finding that California's time bar is adequate in the federal procedural default context.

CONCLUSION

For the reasons stated, coupled with all of the pleadings and materials submitted before the district court, Respondent respectfully requests that the district court's order dismissing Appellant's federal habeas pleading as procedurally barred be upheld.

Dated: February 26, 2009

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STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: February 26, 2009

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR 08-15752

I certify that: (check (x) appropriate option(s))

[X] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

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February 26, 2009 — ***/s/ R. Todd Marshall***

Dated — R. Todd Marshall
Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: **Martin** v. **Walker** No. **08-15752**

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 26, 2009, at Sacramento, California.

R. Todd Marshall
Declarant

/s/ R. Todd Marshall
Signature

CERTIFICATE
for Brief in Paper Format

I, R. Todd Marshall, certify that this brief is identical to the version submitted electronically on February 26, 2009, pursuant to Rule 6© of the Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases.

Date: March 3, 2009

Signature: ***R. Todd Marshall***

08-15752

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES MARTIN,	)
	)
Petitioner-Appellant	)
	)
v.	)
	)
JAMES WALKER, Warden,	)
	)
Respondent-Appellees.	)
	)

Appeal from the United States District Court
Eastern District of California (Sacramento)
CIV. S-99-223 WBS/GGH P

Honorable William B. Shubb

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08-15752

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES MARTIN,	)
	)
Petitioner-Appellant	)
	)
v.	)
	)
JAMES WALKER, Warden,	)
	)
Respondent-Appellees.	)
	)

APPELLANT'S REPLY BRIEF

DISCUSSION

Respondent's argument again begs the question posited by this Court on remand, which was, paraphrased slightly: Can the State of California establish that in non-capital cases its procedural timeliness bar is adequate, and that its operative language, "substantial delay" has some identifiable parameters determining what period of time or factors constitute the standard? Without truly explaining how it knows, speculating that the judges making the decision must have gotten it right, respondent answers in the affirmative. Speculation and blind faith do not satisfy this Court's mandate, or meet respondent's burden.

Respondent also argues, *inter alia*, that appellant's assertion that *Clark* and other capital cases are unhelpful to the state's cause is incorrect. RB 29. Again, appellant disagrees, as does this Court. *See, King v Lamarque*, 464 F.3d 963, 966 (9th Cir. 2006). "*Clark* did nothing to clarify the application of the basic 'substantial delay' standard with regard to non-capital cases."

Even though this Court's mandate could not have been clearer, ["the government must show on remand that the rule has since been clarified for non-capital cases and that the clarified rule has since been consistently applied," citing to, *King v Lamarque*, 464 F.3d 963, 967, 968, and *Morales v Calderon*, 85 F.3d 1387, 1393 (9th Cir. 1996)], respondent continues to cite to capital cases and to argue that those cases unequivocally establish the viability of the States' timeliness bar.

As a sop, respondent offers up less than a dozen state appellate court cases which have applied the timeliness bar for myriad reasons. AB 35. Respondent then launches into its argument that *Clark, Robbins, Gallego* and *Sanders* all establish the bar, its clarity and its adequacy, ignoring the thousands of silent, or post card denials for which the State court offers no explanation for the denial, on the grounds that such a review, "of silent denials simply requires too much speculation to be useful to answer the inquiry." AB 39 fn6.

But that's the point isn't it, and tacit proof that respondent has not, and cannot meet its burden that in the "vast majority of cases" the bar has been evenhandedly and consistently applied. *See, Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th Cir. 1996); *Dugger v. Adams*, 489 U.S. 401, 410-412 n.6 (1989).

We simply do not know, because the state court has refused to explain for us, the grounds upon which thousands of habeas petitions since *Clark* and *Robbins* have been denied; or of those thousands of cases, and of the approximately 25% which do cite to *Clark* or *Robbins*, or both, the parameters of the delay which it determined to be substantial and/or unexcused. It's all a mystery, an undecipherable enigma. Without basis in fact respondent assumes, and so argues, that the state court judges made their decisions on the merits of each case, and decided correctly. Thus, respondent would have this Court give the sate a pass and so lighten its burden. Respondent's view is untenable, tantamount to a suggestion that the there is no need for habeas corpus.

One would think not.

In this one regard, on the issue of silent denials, the Magistrate Judge and the district court got it right:

> [T]he decision to reach the merits could mean one of several things: a rigorous review was applied, including the exceptions which are part and parcel of the bar, and the court found justification or a viable exception; it could mean that petitioner did meet his burden to explain the delay; it could mean that the court didn't even see the timelness issue; it could mean that the timeliness issue was problematic that it was much easier in that case to reach the merits; it could mean that the court arbitrarily determined that no bar would be imposed.

ER 37.

Arbitrary, problematic, overlooked. Not exactly the stuff to instill confidence in consistent judicial application. Respondent acknowledging that in California the analysis of timeliness requires a case specific approach. RB 33. Thus, one might also conclude that review requires a case specific approach. But, in California case specific review is unavailable, leaving respondent with only broad, and really unsupported, generalizations and speculation, and the district court to conclude that the state's court's decisions may be arbitrary.

Our judicial system does not permit judicial decisions to be "arbitrarily" made. "Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust." *See United States v Rita*, 127 S.Ct. 2456, 2468 (2007). Where judicial reasoning is unknown, there can be no public trust. Moreover,"[b]ecause it is the State who seeks dismissal based on the procedural bar, it is the State who must bear the burden of demonstrating that the bar is applicable." *Bennett v Mueller*, 322 F.3d 573, 586 (9th Cir. 2003). Because we cannot know the judicial reasoning behind thousands of post-card denials, respondent has failed to meet its burden that the California's timeliness rule is applied in a consistent manner as this Court has required it to do.

Again, one must not lose sight of the fact that in Morales, the this Court held that where it is impossible to tell from the texts of the orders why the California court decides some delayed petitions on the merits and rejects others as untimely there can be no legitimate finding of adequacy.

> It is theoretically possible, we suppose, to reconcile and explain all of the California Supreme Court decisions entertaining on the merits or rejecting as untimely petitions that are three or more years old. Those divergent decisions may indeed represent consistent exercises of discretion rather than random applications of or exceptions to the timeliness rule. But we have no way of knowing whether that is the case. The California Supreme Court's denials of habeas petitions that Morales relies upon were accomplished by brief minute entries in what has been described as "post-card denial." *We can discern no apparent relationship between the time of delay and the findings concerning timeliness. Nor could Morales be expected to do so.*

Morales v. Calderon, 85 F.3d 1387 (9th Cir. 1996). *emphasis added.*

If this Court is unable to discern a relationship between the time of delay and findings concerning timeliness, it is highly unlikely that most *pro se* litigants, or even most lawyers will be able to figure it out.

Finally, and briefly, on the issue of "substantial delay," just how is one to determine exactly what is meant by the term "substantial delay" when even those state court judges who should know, do not. It is an "impossibly amorphous standard" and "nebulous as well as riddled with exceptions and requiring fact-specific analysis, *Gallego*, 18 Cal.4th at 84 (Brown, J., concurring in part and dissenting in part). The rule is "indeterminate at [its] very core," the result of which is that, "its application to any given claim may yield

varying results, as reasonable persons differ as to whether the claim in question has been presented without 'substantial delay' and, if not, whether 'good cause' exists for any such delay." *In re Robbins*, 817 fn.3 (Mosk, J, concurring). If justices from the California Supreme Court find the rule ambiguous, and district court judges can't themselves consistently tell why or even when it will be applied, it may hardly be said the rule gives "fair warning" to the lay person.

Undeniably, the California rule is vague and internally standardless: "diligence" is required, but nowhere defined. "Undue delay" is frowned upon, but nowhere defined. No rule of court or authoritative holding tells non-capital petitioners when a habeas petition will be considered presumptively timely, and when it risks dismissal on timeliness grounds. *See, Bargas v. Burns*, 179 F.3d 1207, 1212 (9th Cir. 1999) (procedural rule must be sufficiently clear to put petitioner on notice regarding its application to his case), cert. denied, 529 U.S. 1073 (2000); *Karis v. Vasquez*, 828 F.Supp. 1449, 1464 (E.D.Cal. 1993) (timeliness rule which is "standardless both substantively and as to duration" does not provide petitioners with adequate notice of the circumstances that will bar their claims, therefore will not support procedural default).

Thus, the mere fact that the California courts cite *Clark* and *Robbins* when denying non-capital habeas petitions as untimely, does not mean that the California courts have clarified the application of the basic "substantial delay" standard with regard to non-capital cases.

CONCLUSION

The only real conclusion that can be drawn from all of the forgoing is that the timeliness rule in California is inadequate. It is neither clear, nor consistently applied and respondent has failed to meet his burden of establishing that either is true.

DATED: April 6, 2009

Respectfully submitted,

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BRIEF FORMAT CERTIFICATION

1. This brief complies with the type-volume limitation of Fed. R. App. P (32)(A)(7)(B) because:

This Opening Brief contains 1,684 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and

2. This Reply Brief complies with the typeface requirements of Fe. R. App. P. 32(a)(5) and the type style requirements of Fe. R. App. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 Point Courier.

Dated: April 6, 2009 Respectfully submitted,

/S/ MICHAEL B. BIGELOW
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STATEMENT OF RELATED CASES

As far as is known, this case is not related to any case on appeal.

DATED: April 6, 2009 /S/ MICHAEL B. BIGELOW
Michael B. Bigelow

CERTIFICATE OF SERVICE BY CM/ECF

I hereby certify that on April 7, 2009, I electronically filed the foregoing with the clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED April 7, 2009 /S/ MICHAEL B. BIGELOW
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PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
AUG 25 2010
OFFICE OF THE CLERK

No. 09-996

In The Supreme Court of the United States

JAMES WALKER, WARDEN, ET. AL.,

Petitioners,

v.

CHARLES W. MARTIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

Under state law in California, a prisoner may be barred from collaterally attacking his conviction when the prisoner "substantially delayed" filing his habeas petition. In federal habeas corpus proceedings, is such a state law "inadequate" to support a procedural bar because the federal court believes that (1) the rule is vague and (2) the state failed to prove that its courts "consistently" exercised their discretion when applying the rule in other cases?

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OPINIONS BELOW

The memorandum opinion of the Ninth Circuit in Case No. 08-15752, reversing the district court's dismissal of respondent Martin's federal habeas corpus petition, is unpublished. See Appendix to the Petition for Writ of Certiorari (Pet. App.) 1-3. The district court judgment is unpublished, see Pet. App. 4-5, as are the magistrate's underlying "findings and recommendations" (F&Rs). Pet. App. 6-19.

The earlier memorandum opinion of the Ninth Circuit in Case No. 05-15524, reversing the district court's earlier judgment dismissing the petition, is unpublished. Pet. App. 20-23. That earlier judgment of the district court is also unpublished, Pet. App. 25-27, as are the magistrate's underlying "findings and recommendations." Pet. App. 28-59.

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment reversing the dismissal of respondent's federal habeas corpus petition on November 20, 2009. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.1.

PROVISION INVOLVED

Section 2254 of Title 28 of the United States Code provides, in pertinent part:

> "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

STATEMENT OF THE CASE

State Criminal Proceedings

In December 1986, respondent Martin and an accomplice robbed and killed a drug dealer. Following the crime, Martin left the state and was not arrested until nearly ten years later. In 1995, Martin was convicted in a California court of first-degree murder and was sentenced to life in prison without the possibility of parole.

The California Court of Appeal affirmed Martin's conviction on direct review in 1997. The California Supreme Court denied further direct review.

State and Federal Post Trial Proceedings

In 1998, Martin filed a petition for writ of habeas corpus in the California Supreme Court, claiming he had received ineffective assistance of counsel at trial and on appeal and that the trial court erred in jury selection procedures. That court denied the petition in 1999.

Next, Martin filed a petition for writ of habeas corpus in the federal district court. The district court determined that Martin had "exhausted" his state-court remedies on only some of his claims. So, in February 2001, the court granted Martin a stay of the federal proceedings so that he could go back to the California Supreme Court and exhaust his remedies on his new claims.

Martin then filed his second California Supreme Court petition for writ of habeas corpus in March 2002—nearly five years after his conviction had become final and more than three years after the state supreme court had rejected his first state habeas petition. Joint Appendix (JA) 8, 9, 13. Martin claimed that his trial counsel was ineffective for failing to investigate witnesses and third party culpability and for failing to prevent the admission of certain evidence. Martin also claimed his appellate counsel was ineffective for failing to raise, on direct appeal, claims of prosecutorial misconduct, denial of confrontation, and insufficient evidence of guilt.

The California Supreme Court denied this second state petition in September 2002, citing *In re Clark*, 5 Cal.4th 750, 855 P.2d 729 (1993), and *In re Robbins*, 18 Cal.4th 770, 780, 959 P.2d 311, 317 (1998). Pet. App. 60. These citations indicate that Martin's new second-petition claims were forfeited for lack of "timeliness." See *In re Robbins*, 18 Cal.4th, at 814, n. 34. California's habeas corpus timeliness rule requires state habeas corpus petitioners to file their known claims "as promptly as the circumstances allow" and without substantial unexplained delays. *In re Clark*, 5 Cal.4th, at 765, n. 5, 855 P.2d, at 738, n. 5. Further, the rule requires petitioners to disclose when they first learned of their claims and why they did not file sooner. Petitioners who file after substantial delay and without adequate justification might still obtain merits review, but only if they qualify for one of four enumerated exceptions to the rule. *In re Robbins*, 18

Cal.4th, at 780-81, 959 P.2d, at 317-18. The denial of Martin's claim for lack of timeliness, however, meant that the California Supreme Court had determined that none of the exceptions applied. See *In re Robbins*, 18 Cal.4th, at 814, n. 34.

Martin returned to federal court and filed an amended petition, raising six claims, in January 2003. The state moved to dismiss the petition on the basis that some of the claims were too late under the federal statute of limitations. See 28 U.S.C. § 2244. The state also argued that all six of Martin's claims were procedurally barred because they had been forfeited in state court under state procedural rules. Relying on the state-court precedent of *In re Dixon*, 41 Cal.2d 756, 759, 264 P.2d 513, 514 (1953), the state asserted that petitioner could and should have raised some of the claims on direct appeal rather than in a later state habeas corpus petition. The remaining claims, the state further argued, were procedurally barred because they had been deemed forfeited by the *Clark/Robbins* procedural ruling in state court.

The magistrate found that some claims were too late under the federal statute of limitations. The magistrate also found that other claims were procedurally barred because Martin could and should have raised them in state court on direct appeal. In addition, the magistrate concluded that claim 3 (ineffectiveness of trial counsel for failure to investigate witnesses and present a defense of third party culpability), claim 4 (ineffectiveness of trial counsel for failure to effectively object to certain

evidence), claim 5 (denial of personal presence at part of the trial), and claim 6 (ineffective appellate counsel) were all procedurally barred because the California Supreme Court had ruled that petitioner had failed to present them in a timely fashion as required by *Clark/Robbins*. The procedural bars were enforceable in federal court, the magistrate explained, because Martin had not made a sufficient factual allegation that the state procedural rule was inconsistently applied so as to shift the burden of proof to the state under the Ninth Circuit precedent of *Bennett* v. *Mueller*, 322 F.3d 573 (9th Cir. 2003). Pet. App. 28-59.

Martin objected only that he had shifted the *Bennett* v. *Mueller* burden back to the state with respect to the procedural bar applied to claims 3 through 6. But, in March 2005, the district court agreed with the magistrate and dismissed the entire petition. Pet. App. 25-27.

On appeal in 2006, a Ninth Circuit panel agreed that some of Martin's claims were too late under the federal statute of limitations. However, the panel reversed the district court and remanded claims 3, 4, and parts of claim 6 for a determination of the "adequacy" of the state's timeliness rule. Pet. App. 20-23.

On remand, the magistrate recommended that the remaining claims be dismissed as procedurally barred. After reviewing state court decisions, the magistrate found that it was well established that

the California timeliness rule applied to both capital and noncapital cases; and that the rule was sufficiently clear and consistently enforced, so as to support the federal procedural bar against Martin's remaining claims. The district court agreed and dismissed Martin's petition. Pet. App. 4-19.

In an unpublished memorandum, however, the Ninth Circuit again reversed the district court's judgment. The court of appeals held that California's habeas corpus timeliness bar was "inadequate" to support a federal procedural bar because the state had not met its *Bennett* v. *Mueller* burden of showing that the rule was clear and consistently applied. As the Ninth Circuit put it, California "has chosen to employ an undefined standard of 'substantial delay' in denying state habeas petitions for untimeliness, rather than using fixed statutory deadlines," and the state had not proven that the state courts "consistently" applied the rule in other cases. The Ninth Circuit panel remanded the case for a determination of the merits of Martin's remaining claims. Pet. App. 1-3.

SUMMARY OF ARGUMENT

The California Supreme Court's denial of Martin's second state habeas petition on untimeliness grounds suffices to bar Martin's defaulted claims in federal habeas corpus proceedings. The state procedural rule is adequate to support the state judgment because it provides fair notice of what

respondent was required to do and because the rule serves a legitimate state interest. Indeed, the federal court should presume the adequacy of state procedural default rules. The habeas corpus petitioner, instead, should bear the burden of proving, as part of the "cause and prejudice" exception for barred claims under modern habeas corpus law, why the federal court nevertheless should consider the merits of his claims under the particular circumstances of his case.

I.

Where a habeas corpus petitioner forfeited a claim in state court by failing to adhere to an "adequate" state procedural rule, his claim generally will be barred in federal habeas corpus proceedings. As may be distilled from this Court's many cases discussing "adequacy" in different contexts, a state procedural rule is "adequate" when the petitioner had fair notice of the rule and the rule served a legitimate state interest.

A. In most cases where this Court has found state rules inadequate, a lack of fair notice was explicitly or implicitly the basis for the decision. E.g., *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958). Fair notice exists when a person of ordinary intelligence can reasonably understand what is required to comply with the state procedural rule. See *United States* v. *Harris*, 374 U.S. 612, 617 (1954). Conversely, fair notice does not exist when the

state court announces a new procedural rule and applies that rule retroactively, *Ford* v. *Georgia*, 498 U.S. 411, 424-25 (1991), or when the state court has failed to consistently articulate or define a given state rule so as to frustrate fair notice, *Johnson* v. *Mississippi*, 486 U.S. 578, 588-89 (1988).

Thus, consistent with recognition of fair notice as a hallmark, this Court has observed that a state procedural rule is adequate if it is "'firmly established and regularly applied.'" *Beard* v. *Kindler*, 130 S.Ct. 612, 617 (2009). Unfortunately, however, such terminology has led some federal courts, including the Ninth Circuit in this and many other cases, to employ an overly restrictive and mechanical standard for adequacy. They seek an arithmetical level of "consistent application," as if for its own sake, and lose sight of the purpose of the adequacy inquiry—vindicating fair notice and legitimate state interests.

Instead, as recognized by this Court just last Term in *Beard* v. *Kindler*, a state rule provides fair notice even if it permits discretion. So fair notice adequacy is not defeated just because the case by case necessary by products of such discretion in applying the rule or its possible exceptions superficially might seem, from the federal court's distant vantage, to be "inconsistent" applications of the state rule in cases other than the petitioner's. Such characteristics, present in California's timeliness rule, make it treacherous and untenable for the federal court to scrutinize how the state courts have exercised

discretion tinged state law rules in other cases of merely superficial similarity. Rather, the key remains whether the state rule, as formulated, provides fair notice of its requirements to litigants to give them an opportunity to present their claims. If it does, then perceived "inconsistent" applications of the procedural rule on the unique facts of other cases rarely will show that the petitioner somehow had been mislead so as to negate fair notice.

B. In addition to ensuring fair notice, this Court's "adequacy" jurisprudence reflects that a state procedural rule must serve a legitimate state interest. When the rule fails to advance any legitimate state interest, a federal court's refusal to respect the rule does not offend comity or federalism. For example, if the rule on its face were to invidiously discriminate against federal claims or claimants, it certainly would advance no legitimate interest. Similarly, if the rule in general imposes arbitrary obstacles that frustrate any opportunity for the petitioner to present his claim, it may be found to be inadequate as an "arid ritual of meaningless form." See, e.g., *Staub* v. *City of Baxley*, 355 U.S. 313, 320 (1958). Because state rules typically serve any one of many legitimate interests, however, it will be the rare rule that can be said to serve none.

C. Of course, even a rule adequate on its face or in general might sometimes operate in a particular case in a fundamentally unfair manner. For example, this Court has sometimes declared a state procedural rule "inadequate" because it served no legitimate

state interests in the unique circumstances of a specific case. E.g., *Lee* v. *Kemna*, 534 U.S. 362, 376 (2002). But the availability of this Court's modern "cause and prejudice" exception in habeas corpus cases obviates any need to treat individual cases of injustice as instances of alleged "inadequacy" of the state rule itself. The "cause and prejudice" inquiry serves as the most appropriate check against a miscarriage of justice in a specific case.

II.

Just as comity and federalism concerns led to adoption of the procedural bar doctrine in federal habeas corpus cases, see *Coleman* v. *Thompson*, 501 U.S. 722, 730, 739 (1991), those same considerations dictate that federal courts should presume the adequacy of a state procedural rule invoked by a state court as an independent ground for rejecting a petitioner's claim. Federal courts presume, without further demonstration, the applicability of their own procedural rules; they should not insist on more as a prerequisite to respecting similar state rules. The presumption is further justified by the undeniable good faith of the state courts in faithfully enforcing federal law and the many interests that typically underlie state procedural rules. In addition, without always requiring case by case scrutiny, the presumption would reach the correct result in the vast majority of cases. And it makes sense that the defaulting petitioner should bear the burden of establishing inadequacy of the state rule. When a

petitioner flouts state procedural rules, he deprives the state court of the opportunity to address the merits of the underlying federal claim. So it should be incumbent upon the petitioner to establish that the rule was inadequate to bar federal review.

Habeas corpus policies in particular justify such a presumption. The state's interest in the finality of criminal judgments is a paramount interest. Further, cavalier treatment of state procedural rulings encourages petitioners to seek to short circuit state court review of the merits of their claims and thus to try to avoid AEDPA's central reform requiring deferential review of state court merits adjudications of decisions on federal claims. Also, the "cause and prejudice" safety valve makes intrusive federal scrutiny of state procedural rulings even less justifiable in the habeas corpus context. Finally, placing the burden on the petitioner to demonstrate the inadequacy of a state procedural rule is consistent with the allocation of similar burdens of proof on the petitioner in other areas of federal habeas corpus practice.

III.

Martin's default under California's timeliness rule is adequate to bar federal review of his claims. The timeliness rule provides fair notice of its requirements, and the rule serves legitimate state interests.

A. California's timeliness rule mandates that habeas corpus petitioners act reasonably and with diligence in presenting their claims "as promptly as the circumstances allow," and that they allege with particularity facts showing when they discovered the basis for the claims and specific facts that explain any delay in presenting those claims to the state court. *In re Gallego*, 18 Cal.4th 825, 832-33, 959 P.2d 290, 295-96 (1998); *In re Robbins*, 18 Cal.4th, at 795, n. 16, 959 P.2d, at 327, n. 16; *In re Clark*, 5 Cal.4th, at 765 n. 5, 855 P.2d, at 738, n. 5. As a reasonableness standard, see *Carey* v. *Saffold*, 536 U.S. 214, 222 (2002), it provides fair notice of what is required of the petitioner. "Reasonableness" standards, indeed, suffice to give fair notice of potential civil or criminal liability; so such a standard is particularly "adequate" in the context of a petitioner's post judgment challenge to the "main event" criminal trial.

Certainly, California ought not be penalized, as the Ninth Circuit would have it, for eschewing a bright line or mechanistic timeliness rule in favor of a rule that permits some consideration of the unique circumstances of individual petitioners. In fact, the California rule benefits petitioners because it "is designed to be flexible, and it allows California courts to correct miscarriages of justice." *Carey* v. *Saffold*, 536 U.S., at 235 (Kennedy, J., dissenting).

B. California's timeliness rule also furthers significant and legitimate state interests. As the California Supreme Court has explained, the state timeliness rule in particular protects the state's

strong interest in the finality of its judgments and the protection of its scarce judicial resources. *In re Clark*, 5 Cal.4th, at 766, 770, 855 P.2d, at 739, 742. Such interests are clearly legitimate ones. See *Teague* v. *Lane*, 489 U.S. 288, 309 (1989).

The California timeliness rule is presumptively "adequate." And, in this case, respondent Martin has made no "cause and prejudice" showing to lift the federal procedural bar. The district court was correct in dismissing Martin's defaulted claims. The Ninth Circuit was wrong in reviving them.

ARGUMENT

Introduction

The basic federal rule governing this case is clear. "A federal habeas court will not review a claim rejected by a state court 'if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Beard* v. *Kindler*, 130 S.Ct., at 614; *Coleman* v. *Thompson*, 501 U.S., at 729. Such a bar may be lifted only upon the petitioner's showing of "cause" for the default and actual "prejudice" as a result of the alleged violation of federal law, *Wainwright* v. *Sykes*, 433 U.S. 72, 90-91 (1977), or a compelling case of actual innocence, see *Schlup* v. *Delo*, 513 U.S. 298, 314-15 (1995).

It is also clear and uncontested that the California Supreme Court in Martin's case actually relied on its "timeliness" rule as a sufficient state law procedural basis for rejecting Martin's claims of ineffective assistance of trial and appellate counsel. The California timeliness rule requires that known or reasonably knowable state collateral claims must be presented "as promptly as the circumstances allow." *In re Clark*, 5 Cal.4th, at 765, n. 5, 855 P.2d, at 738, n. 5; accord, *In re Robbins*, 18 Cal.4th, at 778, 959 P.2d, at 317. Here, Martin filed a successive state habeas corpus challenge more than six years after his conviction. Accordingly, in dismissing his ineffective assistance of counsel claims, the state court stated, "Petition for writ of habeas corpus is DENIED. (See *In re Clark* (1993) 5 Cal.4th 750; *In re Robbins* (1998) 18 Cal.4th 770, 780.)" Pet. App. 60.

And, on a final preliminary point, it is undisputed under settled law that application of the timeliness rule was "independent" of any resolution of the merits of Martin's federal claims. *Bennett* v. *Mueller*, 322 F.3d, at 582-83.

The central question in this case, then, is whether the state procedural forfeiture ruling was otherwise "adequate" to bar Martin's claims in the federal habeas corpus court. As the State shows below, it was.

I. A State Procedural Rule is "Adequate" if it Provides Petitioners with Fair Notice of What is Required of Them and Generally Furthers Legitimate State Interests.

This Court has recognized "the important interests in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them." *Coleman* v. *Thompson*, 501 U.S., at 750, citing *McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991). "A State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." *Lambrix* v. *Singletary*, 520 U.S. 518, 525 (1997). "Procedural rules, like the substantive laws they implement, are products of sovereignty and the democratic process." *Lee* v. *Kemna*, 534 U.S., at 395 (Kennedy, J., dissenting). These considerations dictate that state procedural rules should not lightly be dismissed as "inadequate."

In contrast, the chief arguable basis for federal habeas corpus courts to test the state courts' independent procedural forfeiture rulings for "adequacy" is to guarantee that the state rule provides an avenue for vindicating federal claims in the "main event" of state court proceedings. See *Wainwright* v. *Sykes*, 433 U.S., at 88-90; 16B Charles Alan Wright et al., Federal Practice and Procedure §§ 4021, 4024 (2d ed. 1996).

While sometimes the phrases used to describe "adequacy" have varied, this Court's precedents over time have reconciled these competing considerations. Those precedents indicate that, barring extremely unusual circumstances—such as invidious discrimination, see *Lee* v. *Kemna*, 534 U.S., at 391-92 ("established rules have been set aside only when they appeared to be calculated to discriminate against federal law")—the federal interest is satisfied when a state procedural rule furthering a legitimate interest affords petitioners fair notice of what is required of them in order to obtain merits review of their federal claims in state court. The habeas corpus "cause and prejudice" exception provides a sufficient safety net that might save a defaulted claim in cases of injustice.

A. This Court's Precedents Emphasize that Fair Notice of Legitimate State Procedural Rules is the Touchstone for "Adequacy."

As reflected in this Court's precedents, and as documented below, there are "two essential components of the adequate state ground inquiry: First, the defendant must have notice of the rule; and second, the State must have a legitimate interest in its enforcement." *Lee* v. *Kemna*, 534 U.S., at 389 (Kennedy, J., dissenting). Although this Court's precedents have used various phrases to measure adequacy—perhaps prompting this Court's recent suggestion of a need for clarification in this area,

Beard v. *Kindler*, 130 S.Ct., at 619—they point to fair notice as the overarching requirement.

Bringing into relief the central requirement of fair notice, this Court in *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S., at 457, rejected the state court procedural rulings where the "petitioner could not fairly be deemed to have been apprised of [the rule's] existence." "Novelty in procedural requirements" could not thwart federal review sought by those who brought their federal claims to state court "in justified reliance upon prior decisions." *Id.*, at 457-58.

Similarly, in *Wright* v. *Georgia*, 373 U.S. 284 (1963), this Court rejected the state court's procedure based refusal to consider the defendant's challenge to the denial of his new trial motion. Although the defendant had preserved his underlying legal arguments, he merely had failed to formally state that he was relying on them to challenge the denial of his motion. In other words, the petitioner failed to state at the end of his legal arguments, "[a] fortiori it was error for the trial court to overrule the motions for a new trial." *Id.*, at 291. This Court gave two reasons for rejecting the rule as inadequate. It dismissed the state ruling as based on an "arid ritual of meaningless form." *Id.*, at 291. And it explained that the inadequacy of the state's procedural requirement "is especially apparent because no prior Georgia case which respondent has cited nor which we have found gives notice of the existence of any requirement that an argument in a brief be specifically identified with a motion made in the trial court." *Id.*, at 291. Thus,

this Court concluded that the Georgia procedural rule failed to advance a legitimate state interest, see pp. 22-24, *post*, and that the defendant had not been afforded fair notice of what the rule required. *Id.*, at 291.

Notice was also crucial in *Johnson* v. *Mississippi*, 486 U.S. 578. There, the defendant sought relief from his death sentence on the ground that a New York appellate court reversed the felony conviction on which his Mississippi sentence was based. The Mississippi Supreme Court denied relief for, among other reasons, the defendant's failure to raise the issue on direct review. *Id.*, at 583. In reaching the conclusion that the rule imposed by the Mississippi Supreme Court was inadequate, this Court explained that it had found no evidence that the rule had been "consistently or regularly applied" and that, in fact, the "weight of Mississippi law [was] to the contrary" because it directed defendants to challenge the validity of a foreign conviction in the court of the other state. *Id.*, at 588. That is, the rule of procedure being applied was squarely contrary to the state's prior pronouncements of what the rule required of the defendant. *Id.*, at 588-89.

This Court's emphasis on fair notice is also reflected in *James* v. *Kentucky*, 466 U.S. 341 (1984). There, the Kentucky trial court had refused to give a defense requested instruction, regarding adverse inferences from the defendant's failure to testify, because defense counsel had requested an "admonition" rather than an "instruction" and there

was an asserted substantive difference in Kentucky between the two concepts. *Id.*, at 342-44. But this Court noted that the offered distinction between the two words was "not always clear or closely hewn" because Kentucky courts had used the two words interchangeably and under the state's definition, the subject instruction seemed to more closely fit the admonition category. *Id.*, at 346-47. And it concluded that Kentucky's subtle distinction was "not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights." *Id.*, at 348-49. Under the circumstances, the alleged distinction between "admonition" and "instruction" operated as an unfair trap. *Id.*, at 349.

As in *James*, other precedents of this Court speak of adequacy in terms of whether the state rule was firmly established and regularly followed. And, as in *James*, they do so in service of the primary goal of ensuring that the litigant has fair notice of the procedural requirement. Thus, in *Ford* v. *Georgia*, 498 U.S. 411, the Georgia Supreme court ruled that petitioner had procedurally defaulted his claim of racial discrimination in the selection of his jury, and cited the "rule" requiring an objection after the jury was selected but before the trial began. *Id.*, at 417-18. But that procedural rule had not been announced until two years after petitioner filed his initial motion and was specifically made prospective in its application. *Id.*, at 424-25. This Court rejected the procedural ground, explaining that a new procedural

rule could not bar review of an equal protection claim advanced by a defendant who had relied upon the prior rule. In other words, the defendant did not have fair notice of the new rule. *Id.*, at 423, citing *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S., at 457-58.

B. This Court's Precedents Also Require that a State Procedural Rule Serve Legitimate State Interests.

As indicated in *Wright* v. *Georgia*, a state procedural rule is not adequate where, on its face, it serves no legitimate state interest. So, in rare circumstances, the state might have no legitimate interest in the enforcement of a procedural rule. E.g., *Douglas* v. *Alabama*, 380 U.S. 415, 422-23 (1965) (rule necessitating continuous repetition of the same constitutional objections); *Staub* v. *City of Baxley*, 355 U.S., at 317-18 (rule mandating that petitioner challenge individualized sections of the state law as opposed to the statute as a whole); *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923) (rule waiving jurisdictional objections by appearing in the proceeding). But "[m]ost state procedures are supported by various legitimate interests, so established rules have been set aside only when they appeared to be calculated to discriminate against federal law. . . ." *Lee* v. *Kemna*, 534 U.S., at 391-92 (Kennedy, J., dissenting).

For example, in *Lee* v. *Kemna*, 534 U.S. 362, a Missouri state rule of procedure required that continuance motions be written and, when based

upon the absence of witnesses, state the expected materiality of the witnesses' testimony and when they could be expected to return. Upon discovering the unavailability of some witnesses, defense counsel made an oral motion to continue, but failed to articulate materiality or the expected return of the witnesses. The trial judge denied the motion. *Id.*, at 365-66. This Court acknowledged that Missouri's state rule ordinarily served important state interests in regulating continuance motions which could be used as a delaying tactic. Yet it observed that the rule as applied to the defendant was inadequate in this exceptional case. *Id.*, at 366, 381.

In the State's view, however, the best way to address the rare problem of an ordinarily adequate state procedural rule operating in an unusual case in a way that would defeat notice or fail to advance a legitimate state interest is to consider the question under the "cause and prejudice" doctrine. See *Lee* v. *Kemna*, 534 U.S., at 381, 405; *Coleman* v. *Thompson*, 501 U.S., at 750. As explained below, see pp. 28-33, *post*, habeas corpus policies in particular point toward reliance on this safety valve rather than requiring the state to prove adequacy or to risk unnecessarily condemning a state rule as inadequate just because it might work unfairly in a rare and extreme case.

Similarly, any concerns about invidious discrimination in the operation of state procedural rules, which might have arisen in civil rights cases in which this Court's adequacy doctrine saw development in the 1950's and 1960's, has diminished

over time with societal and governmental progress in racial matters. See *Northwest Austin Municipality District* v. *Holder*, 129 S.Ct. 2504, 2511-12 (2009). No longer should there be any suspicion that states might tend to distinguish between federal and state claims in the application of their procedural rules. With emphasis on fair notice and legitimate state interest, and the further guarantee of fairness afforded by the habeas corpus cause and prejudice doctrine, any "obstruction" or discrimination by a state in the application of its procedural rules can be identified and easily corrected if proved. Indeed, since the cause and prejudice doctrine is well suited to control any unwanted obstruction or discrimination, there might not be a compelling need in the habeas corpus context for adequacy scrutiny in the first place.[1]

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[1] See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in support of petition for writ of certiorari in this case, pp. 13-15.

C. Mere "Inconsistent" Application in the State's Enforcement of its Procedural Rule in Other Cases is Immaterial to "Adequacy."

Contrary to the Ninth Circuit's approach in this and other cases, federal court scrutiny of how a state court exercises its discretion or judgment in enforcing a procedural rule in cases other than the petitioner's is almost always misplaced and untenable. This Court in *Beard* v. *Kindler* upheld discretionary rules as adequate. It follows that the necessary results of exercises of case by case discretion, even if perceived as "irregular" from the distant vantage of the federal court, do not render the state rule "inadequate." Occasional "inconsistency" in the results raises no important federal concern. See *Engle* v. *Isaac*, 456 U.S. 107, 121, n. 21 (1982); *Beck* v. *Washington*, 369 U.S. 541, 554-55 (1961); *Gryger* v. *Burke*, 334 U.S. 728, 731 (1947).

Further, it would offend comity and federalism if federal courts were to rely on discretionary procedural rules in their own practice while condemning the state courts for doing so. *Beard* v. *Kindler*, 130 S.Ct., at 618, citing *Francis* v. *Henderson*, 425 U.S. 536, 541-42 (1976). For example, the federal courts retain discretion to excuse a failure to object default. See Fed. R. Crim. Proc. 52(b); *United States* v. *Frady*, 456 U.S. 152, 162-63 (1982); *Davis* v. *United States*, 411 U.S. 233, 241 (1973). Similarly, as this Court decided in *Granberry* v. *Greer*, 481 U.S. 129, 136 (1987), and *Day* v. *McDonough*, 547 U.S. 198,

210-11 (2006), federal courts need not consider procedural bar and statute of limitation defenses if the state fails to assert them in a timely manner; but may exercise "discretion" to review those defaulted defenses on a case by case basis. It does not appear that federal courts hesitate, and undertake a review of their "consistent" enforcement of such rules in other cases, before accepting their procedural rules as valid. Federal courts, similarly, should respect state court procedural rules on the same terms.

Otherwise, the state would face an undesirable conundrum: a choice between maintaining flexibility and leniency that stems from affording courts discretion in enforcing procedural rules or excusing procedural defaults, and thus risking the finality of their judgments, or adopting rigid or strict rules that might operate with harsh results. See *Beard* v. *Kindler*, 130 S.Ct., at 618.

More to the point, mere "discretion" or "inconsistent" application does not deceive litigants as long as consistency of the formulation of the rule places them on fair notice that ignoring the rule risks forfeiture of their claim. Nor does such application of a state rule negate the state's legitimate interest—unless perhaps the rule were applied so rarely as to show virtual abandonment of it.

It is true that this Court on occasion has inquired into the state court's enforcement of procedural forfeitures as to a particular kind of federal claim. *Dugger* v. *Adams*, 489 U.S. 401, 410, n. 6 (1989), and

Wainwright v. *Sykes*, 433 U.S., at 85-86, are two examples, but in both cases this Court upheld the state procedural rule at issue. *Wainwright* v. *Sykes* merely mentioned that the state courts applied the rule in other cases; and *Dugger* v. *Adams* only observed that the rule had been applied "in the vast majority of cases." Adams added that any contrary cases were insufficient to undermine the "adequacy" of the state court decision. The State is aware of no habeas corpus case in which this Court has invalidated a state procedural rule based upon "inconsistent" results in the application of the procedural rule in other cases.

Scrutiny for consistent application, further, involves federal courts in untenable second guessing of the state court's interpretation of its own laws. State courts are the final and authoritative determiners of state law. *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975). Thus, when a state court finds that a state procedural bar acts to create a forfeiture of a petitioner's federal issue, a federal court would be hard pressed to deny the validity of the ruling as a final determination of the state law question. See *Estelle* v. *McGuire*, 502 U.S. 62, 67 (1991). It is untenable for a federal court to later declare such a state court ruling to be inconsistent with other state court exercises of their discretion.

Even where the Ninth Circuit recognizes that a rule has been consistently applied, it has paved the way for renewed attacks on whether the state court subsequently might lapse into renewed "inconsistency." See *Ortiz* v. *Stewart*, 149 F.3d 923,

932 (9th Cir. 1998). Thus, the untenable practice of federal scrutiny of "consistent application" brings about the further undesirable result: that of leaving no definitive settlement of the question. This only illustrates further the bankruptcy of the entire enterprise of second guessing the state courts in their exercise of state law judgment in case by case application of procedural rules.

II. Federal Courts Should Presume the Adequacy of a State Procedural Ruling.

Habeas corpus procedural default law is mainly guided by concerns of comity and federalism and the States' strong interest in the finality of their criminal convictions. *Coleman* v. *Thompson*, 501 U.S., at 730, 739. These considerations dictate that the federal courts should presume the adequacy of a state procedural forfeiture ruling, and place upon the petitioner the burden of establishing that the state rule did not afford fair notice or that the ruling did not generally advance a legitimate state interest.

Comity dictates deference to a state's procedural rules, for they are of "vital importance to the orderly administration of its criminal courts," *Lambrix* v. *Singletary*, 520 U.S., at 525, and "are products of sovereignty and the democratic process." *Lee* v. *Kemna*, 534 U.S., at 395 (Kennedy, J., dissenting). Federal review of defaulted claims, moreover, impacts comity by undermining the State's enforcement of its

own laws. *Coleman* v. *Thompson*, 501 U.S., at 730-31. Further, as noted earlier, it would disserve comity if federal courts anomalously disregarded state procedural rules which are largely similar to those which federal courts endorse in their own practice. *Beard* v. *Kindler*, 130 S.Ct., at 618; *Francis* v. *Henderson*, 425 U.S., at 541-42. In addition, "State courts are duty bound to give full effect to federal constitutional rights and it cannot be assumed that they will be derelict in their duty." *Wade* v. *Mayo*, 334 U.S. 672, 679 (1948).

So federal courts should not assume without proof that a state procedural forfeiture rule, neutral on its face, is applied for no purpose, or in unforeseeable unfair ways, or in ways designed to discriminate against federal claims or claimants. Absent some evidence that a discretionary state procedural rule is operating to discriminate against federal claims, the rule should be found adequate.

Habeas corpus policies underscore the appropriateness of such presumptive acceptance of state procedural rulings. "In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism." *Coleman* v. *Thompson*, 501 U.S., at 730-31. But, in habeas corpus in particular, the State's special and paramount interest in the finality of criminal judgments also weighs heavily in the balance. Further, in the procedural default context, the traditional requirement of exhaustion of state remedies is plainly implicated. Without the

independent and adequate state ground doctrine in the federal habeas corpus context, petitioners could escape the exhaustion requirement by ignoring the state's procedural rules and accepting a forfeiture in state court before raising their claims in federal court. *Id.*, at 731-32.

Moreover, the very existence of the "cause and prejudice" exception in habeas corpus—an exception not available to litigants in the direct review context in this Court from their defaults in state cases—itself counsels in favor of presuming that the state court's state law procedural ruling is valid and adequate. Given this built in protection, there is even less possible justification for viewing state court procedural rulings with suspicion or requiring special justification for those rulings.

Congress' enactment of the AEDPA has provided additional reasons for respecting state procedural default rulings. AEDPA aims to give "effect to state convictions *to the extent possible under law.*" *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (emphasis added). AEDPA policy should guide the interpretation of standard habeas corpus issues such as those involving procedural bars. See *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998). When a federal court inappropriately rejects a fair and neutral state procedural bar ruling, by imposing unnecessary and unconstitutional "adequacy" conditions, it undermines the foundations of the AEDPA reform.

Further, pursuant to 28 U.S.C. § 2254(d), federal courts are required to give broad deference to state court merits rulings upon federal issues. However, when federal courts inappropriately reject state court procedural default rulings and proceed to the merits of federal claims, it might prompt petitioners to seek to evade the exhaustion requirement and avoid the deference accorded by § 2254 because there was no merits ruling issued by the state court. See *Pirtle* v. *Morgan*, 313 F.3d 1160, 1167-68 (9th Cir. 2002); *Fisher* v. *Texas*, 169 F.3d 295, 299-303 (5th Cir. 1999); *Moore* v. *Park*, 148 F.3d 705, 708, 710 (7th Cir. 1998). In disrespecting the exhaustion rule and thwarting the deference standard, unjustified suspicion of a state court's procedural bar rulings has become particularly objectionable under AEDPA.[2]

Presuming the adequacy of state procedural rulings, and placing the burden on the petitioner to prove "inadequacy," moreover, is consistent with the burden of proof applicable in other habeas corpus contexts. When the state relies on a procedural forfeiture ruling to bar a claim, it is similar to setting up an affirmative defense to that federal habeas corpus claim. In an analogous area, when a state pleads the affirmative defense that the petitioner's claims fall outside of the federal statute of limitations, 28 U.S.C.

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[2] In qualifying capital cases, and absent narrow exceptions, the AEDPA allows that "the district court shall only consider a claim or claims that have been decided on the merits in the State courts." 28 U.S.C. § 2264(a).

§ 2244, the petitioner bears the burden of showing the applicability of statutory tolling, *Smith* v. *Duncan*, 297 F.3d 809, 814 (9th Cir. 2002), abrogation on other grounds noted in *Moreno* v. *Harrison*, 245 Fed. App'x 606, 608 (9th Cir. 2007), and equitable tolling, *Pace* v. *DiGuglielmo*, 544 U.S. 408, 415 (2005); *Miranda* v. *Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002); *Alexander* v. *Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002). The petitioner should bear the burden in the procedural bar context too.

In *Coleman* v. *Thompson*, this Court rejected the petitioner's assertion that federal courts should presume that no independent and adequate state ground was relied upon in every case in which a state prisoner presented federal claims to a state court. *Coleman* v. *Thompson*, 501 U.S., at 737-38. Once the state pleads that a state court procedural forfeiture ruling was applied to a petitioner's claims, the burden of showing that the state rule failed to provide fair notice and was therefore inadequate to support the judgment should be placed upon the petitioner. Any other rule engages federal courts in the improper presumption that state court decisions are invalid or unconstitutional. The opposite, however, is true. And, after all, a presumption should "reach the correct result most of the time." *Coleman* v. *Thompson*, 501 U.S., at 737. Here, a presumption in favor of the adequacy of the state procedural ruling would do so. For it will be the rare case in which an otherwise fair state procedural rule operates in an unfair way in a particular case.

Nor should federal courts apply their procedural rules in their own cases without any excessive scrutiny for adequacy yet require such scrutiny for the states courts' similar applications of their procedural rules. "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944). Even though federal appellate courts are permitted to reach barred claims upon a showing of plain error pursuant to Federal Rule of Criminal Procedure 52(b), there apparently is no "adequacy" scrutiny into "consistent" application as a prerequisite. Instead, in comparable federal collateral proceedings, the federal courts apply the federal procedural rule and require the petitioner to show "cause and prejudice" in order to lift the bar. See *United States* v. *Frady*, 456 U.S., at 167; see also *Davis* v. *United States*, 411 U.S. 233. Equivalent solicitude for the state courts should be the rule as well.

III. California's Timeliness Rule is Adequate to Bar Martin's Claims from Federal Habeas Corpus Review.

California's procedural rule requiring timely presentation of habeas corpus claims "as promptly as the circumstances allow" is adequate to support the state court procedural dismissal of Martin's claims.

The state rule fairly placed respondent Martin on notice that he was risking forfeiture of his claims when he delayed presenting them to the state court, and the state rule on its face obviously serves legitimate state interests in finality, in preserving judicial resources, and in the reliability of retrials.

A. California's Timeliness Rule Provides Petitioners with Fair Notice of What is Required of Them in Order to Obtain Merits Review of Their Federal Claims in State Court.

1. The California Supreme Court's pronouncements on the habeas corpus timeliness rule provide fair notice to petitioners that they must present known or reasonably knowable claims promptly unless they are actively engaged in the investigation of additional claims. And petitioners are clearly told that they have a reporting duty in which they must articulate with specificity when they learned of their claims and what circumstances, if any, prevented them from seeking review sooner.

As the California Supreme Court has clearly explained, state habeas corpus claims must be filed without "substantial delay," i.e., "as promptly as the circumstances allow." *In re Clark*, 5 Cal.4th, at 765, n. 5, 855 P.2d, at 738, n. 5. Delay in seeking habeas relief is measured from the time a petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and

the legal basis for the claim. *In re Robbins*, 18 Cal.4th, at 780, 787, 959 P.2d, at 317, 323. In capital cases, there is a presumption that a habeas corpus petition is timely if it is filed within 180 days from the date that the direct review reply brief is due. Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3, standard 1-1.1. However, once the presumption of timeliness has passed, the timeliness requirements are applicable to "*all habeas corpus petitions*." *In re Clark*, 5 Cal.4th, at 783, 855 P.2d, at 751.[3]

To establish absence of "substantial delay," petitioners must specifically allege, with supporting evidence, when information offered in support of each claim was known, and reasonably should have been known. *In re Gallego*, 18 Cal.4th, at 832-33, 959 P.2d, at 295-96; *In re Robbins*, 18 Cal.4th, at 795, n. 16, 959 P.2d, at 327, n. 16. Of course, claims relying exclusively on the face of the trial or appellate record reasonably should have been known at that time. *In re Gallego*, 18 Cal.4th, at 838, 959 P.2d, at 299; *In re*

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[3] This represents another area where the Ninth Circuit has engaged in an untenable second guessing of California's interpretation of its own laws. Despite California's clear pronouncement that capital and noncapital litigants are treated the same once the presumption of timeliness passes, the Ninth Circuit has declared that California's capital cases provide no guidance in the noncapital context. *King* v. *LaMarque*, 464 F.3d 963, 966 (9th Cir. 2006) ("*Clark* did nothing to clarify the application of the basic 'substantial delay' standard with regard to noncapital cases.").

Robbins, 18 Cal.4th, at 814, 959 P.2d, at 340. It is not incumbent upon the respondent to allege what petitioner and/or his counsel knew with respect to a particular claim, or when they should have known it. It is the petitioner, in possession of the information, who "must 'get down to details.'" *In re Gallego*, 18 Cal.4th, at 837, 959 P.2d, at 298-99.

Under certain circumstances, substantial delay nevertheless may be justified. Thus, while a petitioner is still conducting an ongoing investigation into further claims, based on "triggering" information giving rise to a bona fide belief that such further claims exist, he may temporarily withhold presentation of completed claims until the investigation concludes, rather than presenting his claims in piecemeal fashion in successive petitions. *In re Gallego*, 18 Cal.4th, at 838, n. 13, 959 P.2d, at 299, n. 13; *In re Robbins*, 18 Cal.4th, at 805-06, n. 28, 959 P.2d, at 335, n. 28. However, when there is no "bona fide investigation into other potentially meritorious claims," then a petition advancing the known claims must be presented promptly. *In re Gallego*, 18 Cal.4th, at 834, 959 P.2d, at 297; *In re Robbins*, 18 Cal.4th, at 805-06, 959 P.2d, at 311.

Finally, an exception to the timeliness requirement will be made for an unjustifiably delayed petition if the petitioner can show that the conviction and/or sentence being challenged constitutes a "fundamental miscarriage of justice." A "fundamental miscarriage of justice" occurs where (1) an error of constitutional magnitude led to a trial that was so

fundamentally unfair that, absent the error, no reasonable judge or jury would have convicted the petitioner; (2) the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (3) the death penalty was based on a profile of the petitioner so grossly misleading, that absent the trial error or omission, no reasonable judge or juror would have imposed the sentence of death; or (4) the petitioner was convicted or sentenced under an invalid statute. *In re Robbins*, 18 Cal.4th, at 780-81, 959 P.2d, at 318. The first three exceptions are determined exclusively by an application of state law. Federal law is applied to the fourth exception when a federal constitutional claim is being resolved. *Id.*, at 812, n. 32, 959 P.2d, at 339, n. 32. The exceptions are general and apply to all cases, but for the one that pertains solely to imposition of a death sentence. *Id.*, at 780-81, 959 P.2d, at 317-18.

2. Despite California's clear edict that known claims be presented promptly, the Ninth Circuit has refused to respect the state's timeliness default rulings, asserting that "[t]here are no standards for determining what period of time or factors constitute 'substantial delay' in noncapital cases" and "no standards for determining what factors justify any particular length of delay." *King* v. *LaMarque*, 464 F.3d, at 966. Similarly, the Ninth Circuit declares, "'substantial delay' has not yet been defined." *Townsend* v. *Knowles*, 562 F.3d 1200, 1207-08 (9th Cir. 2009). On such grounds, the Ninth Circuit has

engaged in a wholesale refusal to respect California "timeliness" rulings.

The exactitude that the Ninth Circuit seeks is unjustified. California employs a reasonableness standard for timeliness in collateral state challenges. See *Evans* v. *Chavis*, 546 U.S. 189, 192 (2006) ("Under [California's collateral review] system, the equivalent of a notice of appeal is timely if filed within a 'reasonable time.'") *Carey* v. *Saffold*, 536 U.S., at 221. That is, California state collateral challenges are to be presented reasonably promptly. See *In re Robbins*, 18 Cal.4th, at 778, 959 P.2d, at 316. State petitioners must conduct reasonable and diligent investigations so that all of their claims for relief can be presented in their first habeas petition. *In re Robbins*, 18 Cal.4th, at 793, n. 14, 959 P.2d, at 326, n. 14; *In re Gallego*, 18 Cal.4th, at 836, n. 10, 959 P.2d, at 298, n. 10 (citing *McCleskey* v. *Zant*, 499 U.S., at 498). And they must allege facts demonstrating due diligence. *In re Clark*, 5 Cal.4th, at 779, 855 P.2d, at 748.

A reasonableness standard of this type—expressed in terms of promptness, substantial delay, and justification—provides adequate notice. In numerous contexts, failure to adhere to a standard of "reasonableness" may subject individuals to both civil liability and criminal punishment. Thus, citizens are liable in tort for "unreasonable" negligence. *American Motorcycle Assn.* v. *Superior Court*, 20 Cal.3d 578, 586, 578 P.2d 899, 904 (1978). Likewise, civil liability under the Federal Securities Act can be predicated

upon a failure to exercise "reasonable" care in preparing registration statements. *Feit* v. *Leasco Data Processing Equipment Corp.*, 332 F.Supp. 544, 568 (E.D.N.Y. 1971). And citizens may be found criminally liable where they "unreasonably" believe they need to defend themselves. *People* v. *Blakeley*, 23 Cal.4th 82, 87-88, 999 P.2d 675, 678 (2000). Similarly, a simple kidnapping becomes aggravated kidnapping where the perpetrator "substantially" increases the risk of harm. See *People* v. *Nguyen*, 22 Cal.4th 872, 885-86, 997 P.2d 493, 501 (2000). If "reasonableness" and "substantial" standards are appropriate in substantive rules of civil and criminal liability, they do not become infirm when they are employed in a state procedural rule governing litigation of collateral attacks on the "main event" criminal trial. *Beard* v. *Kindler*, 130 S.Ct., at 618.

Nor must state courts articulate in advance all of the parameters of their procedural rule or all possible justifications or every factual scenario that will qualify for an exception in order to obtain a finding of adequacy. *Beard* v. *Kindler*, 130 S.Ct., at 620 (Kennedy, J., concurring). Thus, in *Central Union Telephone Co.* v. *City of Edwardsville*, 269 U.S. 190 (1925), an Illinois rule provided that constitutional claims must be pursued in the state high court in the first instance and that, if the claims were brought initially to the lower appellate court, the constitutional claims would thereby be forfeited. The litigant complained that he could not tell whether the state rule governed federal constitutional claims as

opposed to state constitutional claims because the Illinois state high court had not previously made the distinction clear. But, as this Court explained, "[i]t is not, however, a forced or strained interpretation to hold" that the state rule contemplated both the state and federal constitutions. *Id.*, at 195. While notice is the central inquiry, all of the particulars of a state rule need not be fleshed out in advance. See also *Beard* v. *Kindler*, 130 S.Ct., at 620 (Kennedy, J., concurring).

The Ninth Circuit also is wrong in refusing to respect California's procedural rules because, as it asserts, the "overly ambiguous standards almost inevitably lead to inconsistent application." *King* v. *LaMarque*, 464 F.3d, at 966; see *Bennett* v. *Mueller*, 322 F.3d, at 573, 583; *Morales* v. *Calderon*, 85 F.3d 1387, 1392 (9th Cir. 1996). As explained above, see pp. 25-28, *ante*, however, federal criticism of reasonably clear state procedural rules for mere "discretion" or resultant "inconsistent" application does not significantly promote any legitimate procedural bar policy. When a convicted criminal has been put on fair notice of a state's procedural requirements, and yet ignores the rule, he has no proper basis to complain when the state court predictably bars his claims, regardless of whether the federal court thinks the state court should have applied the rule to different litigants on different facts. As Justice Kennedy recognized in his concurring opinion in *Beard* v. *Kindler*, if federal courts insist that a state procedural rule be established in all of its detail before it will be given

effect in federal court, it would deprive the states of the case law decisional approach that the federal judiciary finds proper and necessary in administering its own procedural rules. *Beard* v. *Kindler*, 130 S.Ct., at 620 (Kennedy, J., concurring).[4]

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[4] In this case, the Ninth Circuit rejected California's collateral challenge timeliness rule, which is based upon the state's exercise of discretionary judgment in determining reasonableness, because, "The decisions that do discuss *Clark* or *Robbins* do not form a coherent pattern of consistent application. *Compare, e.g., In re Little*, No. D047468, 2008 WL 142832 (Cal. Ct. App. Jan. 16, 2008) (fourteen months not an unreasonable delay), *with People* v. *Fairbanks*, No. C047810, 2006 WL 950267 (Cal. Ct. App. Apr. 11, 2006) (one year delay substantial and untimely)." Pet. App. 3. By measuring the results of the application of California's discretionary based procedural rule, the Ninth Circuit engaged in untenable second guessing of California's interpretation of its own laws.

The *In re Little* opinion did not hold that 14 months was per se a reasonable delay. There, the state appellate court held, in footnote 6, "In the circumstances of this case, we conclude Little did not unreasonably delay . . . ." The court did not expand upon what circumstances led it to that conclusion. In an unpublished decision that resolves this procedural point in favor of the petitioner but ultimately denies the petition on the merits, it is understandable that the court did not expend limited resources to belabor the point. In *People* v. *Fairbanks*, on the other hand, the court held that one year was an excessive delay, because the petitioner had made no showing whatever of any cause for the delay. Despite the default, the court went on to alternatively reject the claim on the merits.

These cases do not show courts setting traps for unwary petitioners or discriminating against the assertion of federal rights. Rather, California's flexible standard allowed one of the courts to accept circumstances it thought warranted an extension, while the other did not because it found no such

(Continued on following page)

B. California's Timeliness Bar Promotes a Strong State Interest in the Finality of its Criminal Convictions and the Protection of its Scarce Judicial Resources.

There can be no doubt that the state timeliness rule also is adequate in that it serves legitimate state interests. The California Supreme Court has stressed that its habeas corpus rules and the timeliness bar in particular are aimed at the state's strong interest in the finality of its judgments and the protection of its scarce judicial resources. *In re Clark*, 5 Cal.4th, at 766, 770, 855 P.2d, at 739, 742; *In re Harris*, 5 Cal.4th, at 831, 855 P.2d, at 399-400. "The diligence requirement is not some abstract technical obstacle placed randomly before litigants seeking relief, but instead reflects the balance between the state's interest in the finality of decided cases and its interest in providing a reasonable avenue of relief for those whose rights have allegedly been violated." *People* v. *Hyung Joon Kim*, 45 Cal.4th 1078, 1097, 202 P.3d 436, 449 (2009). Protecting the finality of criminal convictions and scarce judicial resources are legitimate state interests. *Teague* v. *Lane*, 489 U.S., at 309; *Schlup* v. *Delo*, 513 U.S., at 322-24; *Calderon* v. *Thompson*, 523 U.S., at 555-56.

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justification. This example shows why measuring the results of the application of a state's discretionary procedural rule necessarily engages federal court's in the untenable second guessing of a state court's pronouncements of its own rules and is completely unworkable.

As the California Supreme Court also has explained, "[n]o one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation." *In re Harris*, 5 Cal.4th, at 831, 855 P.2d, at 400, quoting *Mackey* v. *United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring and dissenting). The California Supreme Court has also recognized the importance of finality to victims of crime: "[W]e cannot overestimate the value of the psychological repose that may come for the victim, or the surviving family and friends of the victim, generated by the knowledge the ordeal is finally over." *In re Sanders*, 21 Cal.4th 697, 703, 981 P.2d 1038, 1042 (1999).

C. Martin has Shown No Cause and Prejudice, or Actual Innocence, to Lift the Federal Procedural Bar.

In the Ninth Circuit, Martin's sole basis for attacking California's timeliness bar was an asserted lack of clarity and consistency. JA 32-56, 110-116. In Martin's successive state high court collateral challenge, he merely asserted in a conclusory way that he had "acted with diligence" and that the "People will suffer no prejudice" from his delay. JA 11. This justification, offering no specific facts about when he learned or should have learned the basis for his claims and why he had not presented them earlier, utterly failed to comport with the state's

clearly established disclosure requirement. See *In re Gallego*, 18 Cal.4th, at 832-33, 959 P.2d, at 295-96; *In re Robbins*, 18 Cal.4th, at 795, n. 16, 959 P.2d, at 327, n. 16. Nor did Martin ever advance any argument that one of the state's four exceptions to the timeliness rule applied to him.

Similarly, Martin has never advanced any argument in federal court that the state's timeliness rule was calculated to discriminate against federal rights. And, finally, Martin has never advanced any claim that the cause and prejudice doctrine applied to him or asserted a compelling claim of actual innocence.

In sum, Martin's procedural default under the California timeliness rule was adequate to support the state judgment and to bar his forfeited claims from federal habeas corpus review.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Dated: August 25, 2010

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RESPONDENT'S BRIEF

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JAMES WALKER,

Petitioner,

v.

CHARLES W. MARTIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

(1) Whether a state court practice of determining the timeliness of non-capital habeas petitions on a case-by-case basis, with no established rule or principle for deciding either when a petition is untimely or whether its untimeliness will be ignored – a practice that has resulted in inconsistent treatment of similarly situated habeas petitioners – constitutes an "adequate" state procedural ground for extinguishing a federal constitutional claim.

(2) As the state offered up California's timeliness bar as an affirmative defense to Martin's claims, was the burden of proving that defense properly allocated to the state as the proponent of the defense?

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STATEMENT OF THE CASE

The Procedural History Of This Case

Respondent Martin is serving life imprisonment without the possibility of parole following a conviction for the robbery and first-degree murder of Charles Stapleton. Following his conviction, Martin raised six claims in his application for federal habeas corpus relief. Three of those claims, and part of a fourth, were dismissed on procedural grounds that are not before this Court. California's timeliness bar was applied to the following claims: Claim 3 (alleging a Sixth Amendment violation due to trial counsel's failure to investigate and present evidence that one Bobby Austin was culpable for the robbery and murder); Claim 4 (alleging a Sixth Amendment violation due to omissions of trial counsel that permitted testimonial out-of-court statements to be played to the jury); Claim 6 (alleging ineffective assistance of appellate counsel for failing to argue that admission of the testimonial statements violated the Confrontation Clause, and for failing to assert in a petition for review to the California Supreme Court that the evidence was insufficient to support conviction for robbery).

1. Factual Background

Charles Stapleton's body was found in a plywood box ten to twelve feet from the edge of the Sacramento

River on December 7, 1986. RT[1] 201-202, 207. Investigation ultimately led to an admitted drug addict, Bonnie Permenter. RT 29-30, 152. Police officers tape-recorded an interview which was admitted into evidence at trial. On the tape, Permenter implicated Martin and Bobby Austin in Stapleton's death.

Later, in an unrecorded interview, Permenter added incriminating detailed statements made by Martin to her. RT 158, 162-65.

On October 24, 1994 (eight years after Stapleton's body was found), Martin was arrested in Florida. RT 452.

2. Pretrial And Trial Proceedings

Prior to trial, the court conducted a hearing pursuant to Cal. Evidence Code § 402(b) to determine whether Permenter's recorded and un-recorded statements would be admitted under the exception to the hearsay rule for past recollections recorded codified in Cal. Evidence Code § 1237.[2]

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[1] "RT" and "CT" refer to the Reporter's and the Clerk's Transcripts of the original trial, lodged in the district court. "CR" refers to the district court docket entries. "ER" refers to the Excerpts of Record filed in the Court of Appeals. "Pet. App." refers to the Appendix accompanying the state's Petition for Writ of Certiorari.

[2] Cal. Evidence Code § 1237, requires that a prior statement be admitted only if the declarant testifies that the prior statement was a true statement of fact.

At the evidentiary hearing Permenter testified and denied any memory of conversations with the police on the topic of a body being found near the river. RT 17, 21-30. She testified that neither Martin nor anyone else had ever confessed to her about having been involved in the murder. RT 18-19.

Permenter also admitted that at the time of her 1986 interviews, she was again drinking and using cocaine. RT 29-30.

At the conclusion of the hearing, the trial court ruled both Permenter's recorded and unrecorded statements were admissible under Cal. Evid. Code § 1237. RT 128, 134-35. The court surmised that even if Permenter were using methamphetamine in 1986, she would have remembered a statement made to her. The court concluded that Permenter's statement to the police was proof that she recalled Martin's statements. The court also found that Permenter was feigning her memory loss as to the original statement and Martin's admissions. RT 42.

During deliberations, the jury requested the Permenter taped interview and the crime scene video. The jury returned a verdict of guilty shortly after reviewing the tapes.

3. Post Conviction History

Martin appealed his conviction to the California Court of Appeal, Third Appellate District. In an unpublished decision, the California Court of Appeal

found the statement to be properly admitted and thus, necessarily found there to be sufficient evidence to support the verdict. Following the denial of Martin's Petition for Review in the California Supreme Court, Martin's conviction became final on July 15, 1997.

On February 19, 1998, Martin filed *pro se* a petition for writ of habeas corpus in the Sacramento County Superior Court.[3] The petition was denied May 19, 1998, in the erroneous belief that Martin's direct appeal was not then final and that he had not shown that his appellate remedy was inadequate.

On June 19, 1998, Martin filed in the California Court of Appeal another petition for a writ of habeas corpus. That petition was summarily denied on June 25, 1998.[4] On July 17, 1998, Martin repeated his allegations in a petition filed in the California Supreme Court,[5] alleging ineffective assistance of both trial and appellate counsel, *citing Strickland v. Washington*, 466 U.S. 668 (1984). Exh. E, State's Mot. Dismiss at 3, 6.

Martin alleged also that his appellate counsel was ineffective "in fail[ing] to incorporate constitutional

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[3] Exhibit C, State's Motion for Summary Dismissal filed July 18, 2000. Clerk's Docket 35.

[4] Exhibit D, State's Motion for Summary Dismissal filed July 18, 2000. Clerk's Docket 35.

[5] Martin supplemented this petition on July 27, 1998.

deprivations on direct appeal and review, in violation of federal and state constitutions." *Id.* at 3.

The California Supreme Court denied Martin's habeas petition on January 27, 1999.[6]

4. Federal Habeas Proceeding

On February 4, 1999, Martin filed his first federal petition.[7] On March 24, 2000 an amended petition was filed,[8] and on July 18, 2000, the state filed a motion for summary dismissal.[9] An additional, amended federal petition followed on March 14, 2001.[10] On March 21, 2002, following an order for stay, a second petition for habeas corpus was filed in the California Supreme Court. That petition was denied on September 11, 2002, with citations to *In re Clark,* 5 Cal. 4th 750 (1993), and *In re Robbins*, 18 Cal. 4th 770 (1998).

On January 21, 2003, a fourth amended federal petition was filed.[11]

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[6] Exhibit F, Fourth Amended Petition, Clerk's Docket 45. The court's citations to *In re Walterus,* 62 Cal. 2d 218, 225 (1965) and *In re Dixon*, 41 Cal. 2d 756, 759 (1953), have no bearing on this petition or the Questions Presented.

[7] Clerk's Docket 1.

[8] Clerk's Docket 30.

[9] Clerk's Docket 35.

[10] Clerk's Docket 41.

[11] None of the previously filed petitions are relevant to the issue currently before this Court.

The district court found some claims procedurally barred pursuant to *In re Dixon,* and that those claims at issue here were barred pursuant to the state's affirmative defense of untimeliness.

On appeal the Ninth Circuit reversed the district court with respect to Claims 3 and 6, sub-parts 2 and 3, concluding that the state, as the proponent of its affirmative defense bore the ultimate burden of proving the elements of that affirmative defense. The Ninth Circuit remanded to afford the state an opportunity to do so.

On remand, the state moved once again to dismiss,[12] offering up 370 habeas cases, analyzing 100 of them, and arguing that the timeliness bar was adequate. However, eight petitions, each filed more than three years and five months after finality of direct review, received no citation to timeliness. The state *hypothesized* each of the eight fell within appropriate exceptions, although in none was the exception articulated.

Similarly, the district court looked to its own survey of explicated decisions, and concluded from it that California's timeliness bar and its exceptions, was consistently adhered to. Pet. App. 6. Accordingly, on March 10, 2008, the district court denied Martin's petition.

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[12] Clerk's Docket 95.

The Court of Appeals reversed the district court finding, that the government had failed to prove that California operated under clear standards for determining what constituted 'substantial delay' and that the state had failed 'to meet its burden of proving that California's timeliness was sufficiently clear to be an adequate state bar.

5. California's Jurisprudence And Practice Regarding The Timeliness Of State Habeas Petitions

a. Introduction

All of California's courts – the superior courts, courts of appeal and the California Supreme Court – have original jurisdiction to hear petitions for writs of habeas corpus. Cal. Const., art. VI, § 10.[13] If a new petition is filed in the California Court of Appeal, and there denied, the prisoner may then file an original petition in the California Supreme Court, bypassing completely both lower courts. *See, e.g., In re Harris*, 49 Cal. 3d 131, 134 (1989).

Although California's habeas rules often lead a petitioner to file in either the superior court or the lower appellate court first, California does not require that a petitioner take any of these intermediary

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[13] A petitioner has no right of direct appeal from the superior court's denial of all or part of the habeas petition. *See, People v. Garrett*, 67 Cal. App. 4th 1419 (1998). He may file another original petition or a petition for review with the California Supreme Court. *See*, Cal. Penal Code § 1506.

steps. *See*, Cal. Const., art. VI, § 10; California Rules of Court 8.380(a), 8.384(a)(1), 8.384(b)(1); *People v. Romero*, 8 Cal. 4th 728, 737 (1994).[14]

Should the court determine that none of the claims present a prima facie case for relief, or that all of the claims are, for one reason or another, procedurally barred, the Court will deny the petition outright with what is commonly, and sometimes pejoratively, referred to as a "post-card denial," but more formally referred to as a "summary denial." *Romero*, 8 Cal. 4th at 737, *citing Clark*, 5 Cal. 4th at 769 n.9.

These summary denials sometimes, but far from anything close to the majority of time, contain a shorthand reference to the reason for the petition's denial in the form of case citations. If the basis for denial is one of California's procedural bars, the citation might reference the bar.[15] On other occasions,

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[14] That being said, a court of appeal has discretion to deny without prejudice a habeas corpus petition that was not filed first in lower court (*i.e.*, in a superior court), but the court of appeal need not do so. *See, In re Steele*, 32 Cal. 4th 682 (2004) (*citing, inter alia, In re Ramirez*, 89 Cal. App. 4th 1312 (2001)).

[15] The following are representative, but not exclusive: *Walterus*, 62 Cal. 2d at 225 (issue raised and rejected on appeal); *Dixon*, 41 Cal. 2d at 759 (1953) (issue should have been raised on appeal); *In re Miller*, 17 Cal. 2d 734 (1941) (issue raised and rejected in prior habeas); *In re Swain*, 34 Cal. 2d 300, 304 (1949) (failure to justify delay in bringing petition); *In re Streeter*, 66 Cal. 2d 47, 52 (1967) (delayed too long in filing the petition); *In re Seaton*, 34 Cal. 4th 193, 197-201 (2004) (claim forfeited by failure to raise claim, or object, in the trial court); *People v.*

(Continued on following page)

but very rarely, the order will summarily state that the petition is denied *on the merits*. Many summary denials, however, are completely silent, bereft of reason, rationale or explanation.

For example: in the six months before and in the six months following Martin's purported default, some 1,960 habeas corpus petitions were denied by the California Supreme Court. Of those, approximately 1,000 were summarily denied without a case citation (specifying a procedural bar), or without a cause specified. More recently, in the first six months of 2010, of the nearly 1,357 petitions denied, approximately 833 petitions were denied without case citation (specifying a procedural bar) or without a cause specified.[16]

b. California's Timeliness Bar Requirements

California's timeliness bar is generally considered to have its genesis in *Swain*, 34 Cal. 2d at 302, which required, "an applicant for habeas corpus, where there is substantial delay, to explain the reasons for the delay." *Moreno v. Nelson*, 472 F.2d 570,

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Duvall, 9 Cal. 4th 464, 474 (1995) (failure to state with particularity the facts upon which a claim is based).

[16] The data presented is derived from searches performed in LexisNexis. The survey is inexact. It is, however, given the data available, reasonably accurate. Even so, and in spite of its limitations, it is certainly instructional.

571 (9th Cir. 1973), *overruled on other grounds, Harris v. Superior Court*, 500 F.2d 1124 (9th Cir. 1974).

In 1993, the California Supreme Court, noting that "no clear guidelines" were discernible from extant case law, attempted to clarify its timeliness rules in *Clark*, 5 Cal. 4th at 763. *Clark* was an elaboration of timeliness policies released by the state supreme court in 1989 to clarify issues in capital cases. *See* Supreme Court Policies in Cases Arising from Judgments of Death, Policy 3: Standards Governing Filing of Habeas Corpus Petitions and Compensation of Counsel in Relation to such Petitions.[17]

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[17] A September 1990 amendment increased this period to 90 days. Subsequent amendments have increased the notice period to its current 180 days. Currently, the Supreme Court Policies (2002) state the following:

> All petitions for writs of habeas corpus should be filed without substantial delay.
>
> 1-1.2. A petition filed more than 180 days after the final due date for the filing of appellant's reply brief on the direct appeal, or more than 24 months after appointment of habeas corpus counsel, whichever is later, may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim and (b) became aware, or should have become aware, of the legal basis for the claim.
>
> 1-2. If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay.

(Continued on following page)

The Policies set forth a number of *Standards* that, among other things, created a presumption of timeliness in *capital habeas cases* and also expressly incorporated the existing *substantial delay* standard from prior case law.

Effectively, what the Court has done is convert California's habeas proceedings, in *capital cases*, to a system wherein habeas corpus matters are litigated in conjunction with direct appeal – not so for non-capital cases.

The California Supreme Court did attempt to clarify what it meant by the term, *substantial delay*. Rather than defining "delay" or "substantial delay" however, it simply described the event that would be treated as commencing a period of delay:

> Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim.

1-3. Any petition that fails to comply with these requirements may be denied as untimely.

1-4. The court may toll the 180-day period of presumptive timeliness for the filing of a capital-related habeas corpus petition (which begins to run from the final due date to file the appellant's reply brief in the appeal) when it authorizes the appellant to file supplemental briefing. The court will not toll before the 180-day presumptive timeliness period begins to run or after it has finished running.

Robbins, 18 Cal. 4th at 780; *see also, Clark*, 5 Cal. 4th at 781.

Although California's timeliness *rule* applies to both capital and non-capital cases,[18] the timeliness *standard* for capital cases is actually quite different, and is far more precise than it is for non-capital cases.

While it is true that many California non-capital habeas cases do in fact cite to the need for a habeas petitioner to file *without substantial delay*, the precedential authority for those non-capital cases is grounded exclusively in capital habeas jurisprudence. Those courts which do find *substantial delay* in non-capital cases consistently cite to capital cases in support. More to the point, they do nothing to clarify for non-capital habeas petitioners just how the capital case guidelines affect them.

Unlike other states, and, unlike the federal scheme, California has declined to establish a determinate time period within which a prisoner may file a petition for habeas corpus in non-capital cases.[19] Instead, a non-capital petitioner must file a petition *without substantial delay*, or if delayed, to

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[18] The present case is of course in the latter category.

[19] Under the statute of limitations established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a state prisoner generally must file his federal habeas petition within one year after his state conviction becomes final. 28 U.S.C. § 2244(d)(1).

satisfactorily explain the delay. *See, In re Harris*, 5 Cal. 4th 813, 828 n.7 (1993).

However, a non-capital petitioner must justify delay *only* when there is present *substantial delay* or a lack of *diligence* in identifying the basis for the claim. *See, In re Stankewitz*, 40 Cal. 3d 391, 396 n.1 (1985) and cases cited. *See also, In re Gallego,* 18 Cal. 4th 825 (1998).

Under California law, *diligence* is required when investigating the basis for a claim, but that term has never been defined. Petitioners are then directed to file their claim within a *reasonable time period* but without *substantial delay.* What exactly constitutes a *reasonable time period,* or *substantial delay* has never been defined.

c. The Ninth Circuit's Ruling

In *Bennett v. Mueller,* 322 F.3d 573, 585 (2003), *citing Gray v. Netherland,* 518 U.S. 152 (1996) (state-court "procedural default is an affirmative defense") and *O'Neal v. McAninch,* 513 U.S. 432, 443 (1995) (party asserting affirmative defense "bears the risk of equipoise") and consistent with the view adopted by the Tenth Circuit, the Ninth Circuit placed the ultimate burden of proving the adequacy of California's affirmative defense of procedural default upon the state. *Bennett*, 322 F.3d at 585-586.

In its earlier memorandum opinion, Pet. App. at 20, the Ninth Circuit found that Martin, once

confronted with the state's affirmative defense, had met his burden of establishing that the state's defense was inadequate.[20] Having satisfied his burden, the burden of proving its defense shifted to the state. *Id.* at 2. On remand Walker was unable to establish that California operated under clear standards for determining what constituted substantial delay, Pet. App. 1, all but conceding he could not do so, at least empirically. Pet. App. at 95, n.6.

> In sum, unlike other states, California has chosen to employ an undefined standard of "substantial delay" in denying state habeas petitions for untimeliness, rather than using fixed statutory deadlines. We have concluded in *Townsend*, and other cases, that this standard has yet to be firmly defined and that the state has not met its burden of proof of showing that the standard is consistently applied. After a careful review of the record in this case, that conclusion remains unaltered.

Because the state failed to meet its burden, proving its affirmative defense of lack of timeliness, the district court was reversed and the matter remanded for a determination on the merits. *Id.* at 1.

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[20] Martin did so by alleging that rule was inadequate as previously determined by *Morales v. Calderon*, 85 F.3d 1387, 1390-92 (9th Cir. 1996).

SUMMARY OF ARGUMENT

Under California law, the writ of habeas corpus is an equitable, flexible remedy, subject to no specific time limits for seeking relief. Under *Clark*, 5 Cal. 4th 750, the leading case on delayed petitions (and repetitive and successive petitions as well), state habeas petitioners who fail to demonstrate the absence of "substantial delay" in presenting their claims, or alternatively the existence of "good cause" for such delay, are at risk for having their claims barred as untimely. Neither *Clark* nor its only three descendants, *Robbins*, 18 Cal. 4th 770; *Gallego*, 18 Cal. 4th 825; and *In re Sanders*, 21 Cal. 4th 697 (1999), provide means for distinguishing those time spans that amount to substantial delay from those that do not. Two of the cases, *Gallego* and *Sanders* shed some light on "good cause" for delay, but only with regard to facts applicable to capital cases alone. As a result of California's "post-card" denial system where the overwhelming majority of petitions for writ of habeas corpus are denied without explanation, the process by which timeliness is assessed on a case-by-case basis is never revealed.

This Court has repeatedly confirmed that the adequate state ground doctrine requires that litigants be fairly apprised of what is required to preserve a federal constitutional claim for review. *E.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958); *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). It is also well-established that the doctrine does not permit state courts to disregard and extinguish

federal rights by invoking untenable state grounds, *e.g., Wright v. Georgia*, 373 U.S. 284, 289-291 (1963); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-301 (1964); *Barr v. City of Columbia*, 378 U.S. 146, 149-150 (1964), including grounds that are not "firmly established and regularly followed." *James v. Kentucky*, 466 U.S. 341, 348-49 (1984).

Clark's timeliness doctrine fails to fairly apprise state habeas petitioners of what they must do to avoid procedurally defaulting their claims. The exhortation to file reasonably promptly fails to provide meaningful guidance. "Delay," "substantial delay," and "good cause" are inherently vague and remain undefined by state court practice. The terms are insufficient to apprise those whose conduct is subject to regulation of what is necessary to comply, or to insure against arbitrary, discriminatory, or ad hoc decision making by those charged with enforcing the regulation. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

Walker's argument that "reasonableness" is a commonplace legal term that is commonly understood to possess sufficiently specific meaning in a variety of settings has no merit. Meaning and ambiguity vary with context and depends on frames of reference. California has provided no benchmarks for assessing whether filing within any given time frame is to be considered "reasonably prompt," "delayed" or "substantially delayed."

The facts do not support Walker's contention that the Ninth Circuit has insisted on a level of mathematical precision that is inherently inconsistent with the exercise of discretion.

Long before this Court's decision in *Beard v. Kindler*, 130 S. Ct. 612 (2009), the Ninth Circuit appreciated that state rules of procedure can be both discretionary and adequate. The Ninth Circuit has not scrutinized the California courts' invocations of *Clark* in a manner likely to confuse discretion and inconsistent application. The court has instead looked to practice to determine whether a sufficiently unambiguous meaning may be gleaned from *Clark*'s rulings in action. Doing so does not violate a presumption that judges follow the law. No Ninth Circuit decision has ever suggested that California judges are violating *Clark*. Empirical observation confirms that in all likelihood state court judges are doing precisely what *Clark* requires them to do: decide matters of reasonableness, delay, and good cause on a subjective ad hoc basis.

Nor is it inappropriate that the ultimate burden of proving the adequacy of the state's timeliness bar, an acknowledged affirmative defense, be allocated to the state. Federal Rules of Civil Procedure, Evidence and relevant case law are clear; a party asserting an affirmative defense has the burden of proving it, a general rule with which Walker implicitly agrees. Pet. Br. at 31. Since Walker tacitly acknowledges his inability to meet his burden and establish the adequacy of the state's affirmative defense of timeliness,

it must be concluded that the Ninth Circuit's findings against him are correct.

Last Term, this Court declined to re-evaluate the circumstances under which federal courts would abstain from exercising review under 28 U.S.C. § 2254(a) on the grounds that an atypical default rule is "unsuitable for providing broad guidance on the adequate state ground doctrine." *Beard*, 130 S. Ct. at 619. California, joined by one amicus from *Beard*, comes before the Court with the identical arguments in a more unsuitable case. The requested revisions, especially if made to accept California's ad hoc, unexplained rulings, would replace an entire existing body of law with a deceptively simple "fair notice" approach, although this Court cannot predict the effect of such a change on a wide variety of federal rights and state procedures. The job of explaining what an adequacy doctrine rooted only in "fair notice" would mean, against the backdrop of a rule extraordinarily vague on its face, would be fraught with difficulty and likely to engender confusion. Moreover, a "fair notice" revision to the adequate and independent state ground doctrine would serve no purpose in this case. Walker seeks primarily to eliminate notions of consistent application, except when relevant to question of notice. Even if the Court were to agree, that would not cure California's consistency problems. "The vices – the lack of guidance to those who seek to adjust their conduct and to those who seek to administer the law, as well as the possible practical curtailing of the effectiveness of judicial

review – are the same." *Interstate Circuit v. Dallas*, 390 U.S. 676, 689-690 (1968).

Amicus argues for an even more radical change to the adequate and independent state ground doctrine, which would split off habeas corpus cases from all other types of cases governed by the doctrine. Adequacy would be eliminated for habeas cases and replaced by a modified version of "cause and prejudice." That request is not properly before the court, *Illinois v. Gates*, 462 U.S. 213 (1983), and should be rejected along with Walker's request to retain the doctrine only in a substantially modified form.

ARGUMENT

I. THE STATE HAS FAILED TO MEET ITS BURDEN OF PROOF AND THUS IS NOT ENTITLED TO ITS AFFIRMATIVE DEFENSE

A. California's Time Bar Is An Affirmative Defense And The Burden Of Proof Is Properly The State's Under Case Law As Well As The Federal Rules Of Civil Procedure

Walker argues that the ultimate burden of proof on adequacy of the procedural bar be assigned to Martin. Pet. Br. at 31. Such an allocation is contrary to the long established burden assumed by a party in litigation asserting the positive of a position, in this case the State's pleading of the affirmative defense of

procedural default against petitioner. This Court's precedent, along with the Second, Fourth, Ninth, and Tenth Circuits, rejects the position advanced by the state. Together, these courts have recognized that it is the state raising a potentially dispositive affirmative defense and thus it is the state that is required to carry the ultimate burden in proving it.

In *Gray v. Netherland*, 518 U.S. 152, 165-66 (1996), this Court specifically held that procedural default is an affirmative defense in a federal habeas corpus proceeding that the state is obliged to either raise or lose. In *Day v. McDonough*, 547 U.S. 198 (2006), this Court's holding, and application of Federal Rules of Civil Procedure 8(c), 12(b) and 15(a) effectively aligned statute of limitations and timeliness bars with other affirmative defenses to habeas petitions. In addition,

> [a]ny possible doubt about this point has been removed by the statutory procedure Congress has provided for the disposition of habeas corpus petitions, a procedure including such non-appellate functions as the allegation of facts, 28 U.S.C. § 2242, the taking of depositions and the propounding of interrogatories, § 2246, the introduction of documentary evidence, § 2247, and, of course, the determination of facts at evidentiary hearings, § 2254(d).

See, Keeney v. Tamayo-Reyes, 504 U.S. 1, 14 (1992) (O'Connor, Blackmun, Steven and Kennedy, dissenting) *citing*, *Ex parte Tom Tong*, 108 U.S. 556, 559-560 (1883).

The rule is not complicated. By virtue of Rule 8(c) a party "[t]o pleading to a preceding pleading shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." J. Thayer, A Preliminary Treatise on Evidence 353-389 (1898). *See, e.g.*, 9 J. Wigmore, Evidence §§ 2485-2498 (J. Chadbourn rev. 1981). There is nothing novel, inconsistent or untoward about the Ninth Circuit's approach. Federal Rules of Civil Procedure, Evidence, and relevant case law make it abundantly clear that a party asserting an affirmative defense has the burden of proving it.

As a settled general rule then, the burden of proving an affirmative defense is on the party asserting it. *See, e.g., Stonehenge Eng'g Corp. v. Employers Ins. of Wausau*, 201 F.3d 296, 302 (4th Cir. 2000); *Girard v. Gill*, 261 F.2d 695, 697 (4th Cir. 1958). It is a rule Walker implicitly concedes. Pet. Br. at 31. But he attempts to escape assignment of his burden of proof by reference to a series of cases that are inapposite and which all involve the shifting of *the burden of producing evidence* rather than assignment of *the ultimate burden of proof* on an issue, as here. Moreover the cases cited by Walker all involve issues of tolling not present in the instant case.

In *Bennett,* 322 F.3d 586, the Ninth Circuit adopted an approach that readily comports with the rules established at common law, is accepted by the Federal Rules of Civil Procedure, and is followed in other civil cases. *See, California Sansome Co. v. Gypsum,* 55 F.3d 1402 (1995). Other circuits concur.

The Tenth Circuit has determined that the state is ultimately responsible for proving the adequacy of a state procedural bar, reasoning that since the bar constitutes an affirmative defense the state is in the best position to establish the uniform application of the procedural rule. *Hooks v. Ward*, 184 F.3d 1206, 1216-17 (10th Cir. 1999). The Second Circuit has taken a middle ground, assuming – without deciding – that "[b]ecause the procedural bar is a defense to a habeas claim, . . . the state bears the burden of proving the adequacy of the state procedural rule." *Cotto v. Herbert*, 331 F.3d 217, 238 n.9 (2nd Cir. 2003).

These circuits are quite correct, but not only because their rules are consistent with the Federal Rules of Civil Procedure. Equitable principles that traditionally govern applications for habeas relief in federal courts recognize that the state is the party raising a potentially dispositive affirmative defense. These equitable principles require the state to carry the ultimate burden in proving it, assigning to the party who most justly and efficiently is able to provide relevant, accurate and necessary information to the court concerning the adequacy of its procedural bar.

The Tenth Circuit agrees, finding that it is the state that is in the better position to establish the regularity, consistency and efficiency with which it has applied a state procedural bar "than are habeas petitioners, who often appear pro se, to prove the converse." *Hooks*, 184 F.3d at 1217. Elaborating on the Tenth Circuit's approach, the Ninth Circuit in

Bennett recognized the obvious when it said, "it is the state, not the petitioner, often appearing pro se, who has at its hands the records and authorities to prove whether its courts have regularly and consistently applied the procedural bar." *Bennett*, 322 F.3d at 585. And, citing to early precedent of this Court, the Ninth Circuit noted that "the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *Id.* at 585 (*citing United States v. New York, N.H. & H.R. Co.* 355 U.S. 253 (1957)).

In addition, while not in and of themselves controlling, California cases also concede that superior knowledge of a party is a strong factor in calling for allocation of the burden of proof upon the party proposing the defense. *See, Orange v. Barrett Amer.*, 150 Cal.App.4th 420, 438 (2007) (in action against county alleging that fees imposed on development projects were excessive, trial judge properly placed burden on county to show that expenditures of amounts collected were reasonable and necessary; county was party with knowledge of and access to evidence regarding its compliance with statute; similarly *see Amaral v. Cintas Corp No. 2*, 163 Cal.App.4th 1157, 1190 (2008)).

It follows then, that although a petitioner must ultimately prove his claim in a habeas action, just as plaintiff ultimately must prove his claim in a tort action, a defendant who pleads an affirmative defense

either in a tort or in habeas, bears the ultimate burden of proving that defense.

The Fifth Circuit is the only Circuit to take an alternative approach, instead *presuming* the adequacy and independence of a state procedural rule. *See, Sones v. Hargett*, 61 F.3d 410, 416 (5th Cir. 1995). But, the Fifth Circuit's approach has been explicitly rejected by the Tenth and Ninth Circuits, and implicitly so by the Second and Fourth Circuits, which have recognized the bar as an affirmative defense and so decline to afford it an irrebutable presumption. *Bennett,* 322 F.3d at 585; *McNeil v. Polk*, 476 F.3d 206, 220 (4th Cir. 2007) (King, concurring).

The burden shifting rules established in these cases make particular sense when determining whether a state procedural rule has met the conditions of adequacy. Since the state is always represented by the Attorney General, the state is in a unique position to ensure that the federal courts are provided all necessary information to determine whether the state's rule is in fact adequate. Indeed, the Attorney General will know of the rule's application in every instance. To place the ultimate burden of proof concerning adequacy on a petitioner would mean that the federal courts will often be provided incomplete and/or inconsistent information regarding the application of the procedural rule.

B. Walker's Analogy To AEDPA's Statute Of Limitations Is Unavailing

Walker seeks to persuade this Court to adopt for the state the same burden shifting rules applied by the federal courts when deciding the applicability of AEDPA's statute of limitations and its tolling provisions. Pet. Br. at 31-32.

Walker misperceives the effect of pleading an affirmative defense, such as statute of limitations, to a claim and misunderstands the obligations of the respective parties when an affirmative defense is raised.

A shift in the *burden of producing evidence* does not relieve an opposing party of its *burden of proof* on an affirmative defense. The burden of going forward with the evidence may shift during the conduct of proceedings without affecting a party's burden of proof as to a particular fact. The tolling and equitable tolling cases referred to in the state's brief (Pet. Br. at 31-32) are not persuasive or even helpful in understanding the burden of proof issue in this case. Rather, those cases articulate a well founded, long employed evidentiary protocol that effectuates a shift in the *burden of producing evidence.* Put simply, when a plaintiff responds to a defendant's claim that the statute of limitations has run, the plaintiff must produce evidence that it has been tolled, or equitably tolled. The plaintiff's *burden of producing evidence* does not relieve the party asserting the time bar

(Walker, in our case) from its ultimate burden of proof that the statute had indeed run.

Walker's misperception in fact highlights the problems with California's indeterminate time bar, particularly when compared to AEDPA's traditional statute of limitations.

Under AEDPA, petitioner has one year from the date the judgment becomes final on appeal to complete preparations as thorough as possible within that time and to present the claims resulting therefrom to federal court. 28 U.S.C. § 2244(a)(1)(A). The statute then addresses three ways in which claims may fall outside of the ordinary course. 28 U.S.C. §§ 2244(d)(1)(A)-(D). In each instance, the statute dictates filing within a year after some identifiable event.

In concrete terms that means that when the state, in its answer, or by way of motion to dismiss, raises the statute of limitations as a defense, petitioner may respond that he is excused by virtue of one of the provisions set forth in 2244(d)(1)(B)-(D). Assuming that he responds satisfactorily, it is then the state's responsibility, its burden, to prove petitioner is not entitled to the cited provision of the statute; that the state is indeed entitled to its affirmative defense that the statute of limitations had run. *See, California Sansome Co.*, 55 F.3d 1402. (A defendant raising the statute of limitations as an affirmative defense has the burden of proving that action is time barred (citing cases)); *see also, Stonehenge Eng'g Corp.*, 201 F.3d at 302; *Girard*, 261 F.2d at 697.

In the context of the burden of proof relative to affirmative defenses, the difference between AEDPA's bona fide statute of limitations, and the state's procedural bar, is conceptually nonexistent. Walker, having raised the procedural bar as a defense, effectively shifted the burden of producing evidence, not the burden of proof, to Martin. Martin alleged the bar to be inadequate. The burden of proving adequacy within the framework of this Court's adequacy jurisprudence then shifted back to Walker, the party raising the affirmative defense. Walker was unable to meet his burden and the Ninth Circuit ruled accordingly.

II. UNDER THIS COURT'S SETTLED RULES REGARDING THE ADEQUACY OF A STATE PROCEDURAL BAR, CALIFORNIA'S PRACTICE OF DECLARING HABEAS PETITIONS TIMELY OR UNTIMELY IS INADEQUATE

A. Procedural Default Doctrine

The procedural default doctrine prohibits federal courts from reviewing a state court decision involving a federal question if the state court decision is based on a rule of state law that is independent of the federal question and adequate to support the judgment. *See Gray*, 518 U.S. at 162; *Lambrix v. Singletary*, 520 U.S. 518, 522 (1997) (*quoting Coleman v. Thompson*, 501 U.S. 722, 729 (1991)).

Whether the state court decision rests on a state law ground that is independent of the federal question and adequate to support the judgment, however, "is itself a federal question." *Lee v. Kemna,* 534 U.S. 362, 375 (2002).

B. The Adequate State Ground Doctrine Repeatedly Confirmed By This Court Requires That A State Procedural Bar Fairly Apprise Litigants Of Its Requirement And Be Regularly And Consistently Applied

Requiring that a state's procedural rules be clear, firmly established and regularly followed, in a word, adequate, protects federal rights from capricious and arbitrary infringement by state courts.

If a state procedural bar is applied arbitrarily, infrequently, or is so vague that it may not be readily understood and thus adherence thwarted, the rule discriminates, in that term's broadest sense, against a federal right and so, is inadequate. *Prihoda v. McCaughily,* 910 F.3d 1379, 1383 (7th Cir. 1990).

Petitioner attempts to separate and parse the concepts of "fair notice" and "consistent application" as measures of adequacy, and then to elevate "fair notice" as a "hallmark" of adequacy. Pet. Br. at 9. In fact, the concepts of *fair notice, consistent application* and *firmly established* are inextricably intertwined as the dissenting opinion in *Lee v. Kemna* observed:

> The initial step of the adequacy inquiry considers whether the State has put litigants on notice of the rule. The Court will disregard state procedures not firmly established *and* regularly followed.

Lee, 534 U.S. at 389 (Kennedy, J., dissenting). *See also Patterson*, 357 U.S. at 457-58 ("[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights").

This Court found in *Staub v. City of Baxley*, 355 U.S. 313, 318 (1958), that an inconsistently applied, and sometimes ignored state procedural rule was an inadequate state ground to foreclose federal review of the underlying federal issue. *Id.* at 320. In cases which followed, federal review was regularly permitted when it became apparent that the procedural rule was not regularly adhered to, and thus, inadequate. *See Barr*, 378 U.S. at 149 (federal review not barred by state procedural grounds "not strictly or regularly followed"); *James*, 466 U.S. at 348, (holding that only state procedural grounds that are "firmly established and regularly followed" will be "adequate" to bar federal review of the underlying federal claim). *See also Ford*, 498 U.S. at 423-424. In *Hathorn v. Lovorn*, 457 U.S. 255 (1982), this Court reached the merits of the petitioner's claim although there was evidence the petitioner had violated the Mississippi Supreme Court's timeliness rule finding, "we cannot conclude

that the state court consistently relies upon this rule." *Id.* at 263. *See also Sullivan v. Little Hunting Park*, 396 U.S. 229, 231 n.1, 233-34 (1969) (with respect to state procedural rule being inadequate because state precedents "do not enable us to say that the Virginia court has so consistently applied [the rule] . . . as to amount to a self-denial of the power to entertain the federal claim here presented if the [court] . . . desires to do so").

In *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988), a default based on a claim that had not been raised on direct appeal when binding precedent from the state's highest court dictated the claim should have been raised in a post conviction motion and not on direct appeal was rejected. In *Barr*, 378 U.S. 146, a deficient objection was found to be an inadequate reason to refuse to review a constitutional claim when the state court held identical objections sufficient three times in the two months before *Barr* and again held the objections sufficient a few weeks later. In *Patterson*, 357 U.S. at 457, an alleged error in the organization of a brief was the purported reason for the state court decision barring relief. It was a minor error and the rule, which the petitioner had allegedly violated, was routinely not enforced. The bar was held to be inadequate. And in *Staub*, 355 U.S. at 320, the state's procedural rule was inconsistent with long standing state supreme court decisions). In *Wright*, 373 U.S. at 291, this Court found inadequate a procedural rule that an appellate brief explicitly link the argument to a claim in the new trial motion because

that rule had never before been enforced in any published case.

While Walker asserts, repeatedly, that it is "untenable" for federal courts to review a state court's application of its own procedural bars for more than fifty years, this Court and the lower federal courts have examined how state courts apply their rules both to ascertain the nature of the rule in order to determine whether the party asserting federal rights actually violated the rule, and to determine whether that conduct was treated similarly in other cases. Far from "second guessing" state courts, adequacy review is an historical query and the only means by which a federal court can discern whether state courts have applied a state procedural bar with such consistency that the rule can be characterized as clearly established and regularly followed.

Even Walker acknowledges, albeit indirectly, that an inconsistently applied state rule is inadequate. *See, e.g.,* Pet. Br. at 19 ("central requirement" is "fair notice" "novelty" cannot thwart federal review); Pet. Br. at 21 (recognizing that the Court's precedents require the state rule to be "firmly established and regularly applied").

The alternative to federal court adequacy review is effectively an irrebuttable presumption that all state procedural bars are well established and consistently applied allowing states to evade federal review regardless of whether the bar is applied even handedly. As described by one court:

> If inconsistently applied procedural rules sufficed as "adequate" grounds of decision, they could provide a convenient pretext for state courts to scuttle federal claims without federal review. The requirement of regular application ensures that review is foreclosed by what may honestly be called "rules" – directions of general applicability – rather than by whim or prejudice against a claim or claimant.

Bronshtein v. Horn, 404 F.3d 700, 708 (3rd Cir. 2005) (per Alito, J.). Examination of state practice ensures that ill-defined or irregularly-applied procedural rules will not result in the inconsistent enforcement of federal constitutional rights for similarly-situated litigants.

Walker's chief complaints about the Ninth Circuit's analysis of the adequacy of the state procedural bar applied in his case are: (1) the Ninth Circuit has taken this Court's requirement that a state procedural rule be "firmly established and regularly applied" before it is deemed "adequate" and turned that into an "overly restrictive and mechanical standard for adequacy" that requires states to apply a bar with an "arithmetical level" of consistency (Pet. Br. at 10); (2) the Ninth Circuit fails to appreciate that a state procedural bar that allows for discretion, and thus inevitably leads to inconsistent results, can still be adequate (Pet. Br. at 10-11); (3) the Ninth Circuit's method of determining whether a state procedural bar is adequate involves an "untenable" examination of state courts' application of their own rules, Pet. Br.

at 10-11; and (4) the Ninth Circuit improperly places the burden of proving adequacy on the government rather than requiring a federal petitioner to prove that the state procedural bar that was invoked in his case is inadequate (Pet. Br. at 12-13).

Thus, in objecting to a consistency review of the state's application of its timeliness rule to habeas petitions, Walker ignores the historical context of this Court's adequacy jurisprudence requiring consistent application. *See, Hathorn*, 457 U.S. at 262-63 (*quoting Barr*, 378 U.S. at 149). That he does so is curious, for in his brief to the Ninth Circuit, Walker acknowledged that the independent and adequate state ground doctrine requires that "the actual application of the default rule to all similar claims has been even-handed 'in the vast majority of cases.'" Pet. App. at 60, *citing Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th Cir. 1996); *Dugger v. Adams*, 489 U.S. 401, 410-412 n.6 (1989). Indeed, the Ninth Circuit can hardly be faulted for doing precisely what this Court has done on numerous occasions.

In *James*, 466 U.S. at 346, this Court reviewed a dozen state court decisions to determine that the Kentucky Supreme Court had no history of inconsistency in distinguishing jury "instructions" from "admonitions." Although Walker cites *Ford*, 498 U.S. 411, for the proposition that a state court may not under the adequate state grounds doctrine announce a new rule and apply it retroactively, Pet. Br. at 10, Walker ignores this Court's additional observation that the state court's invocation of the alleged waiver

rule "also fail[ed] the second *James* requirement that the state practice has been regularly followed." *Id.* at 425.

This case is not about whether review for consistent application is inconsistent with Beard's conclusion that discretionary rules can pass adequacy muster. In fact, years before *Beard* the Ninth Circuit embraced this Court's very point, stating, "The mere fact that a state's procedural rule includes an element of discretion does not render it inadequate." *Fields v. Calderon,* 125 F.3d 757, 761 (9th Cir. 1997), *citing, Morales v. Calderon,* 85 F.3d 1387, 1392 (9th Cir. 1996).

However, judicial discretion is the exercise of judgment according to standards that, at least over time, can become known and understood within reasonable operating limits. Thus it is that this case instead is whether a federal court, consistent with any of the teaching regarding adequacy can honor state court procedural doctrines that subject litigants to unknowable, entirely ad hoc, decisions rendered with unbridled, standardless discretion.

If Walker is to prevail on his argument that that timeliness bar is consistently applied, he is obligated to point to cases where there is some consistency between the present event – (time of default from the state's perspective) – and the past event – (the triggering point, i.e., the specific date upon which the basis for the claim was discovered.) He cannot do so because reported cases rarely identify with specificity the date of default; nor do the state's perfunctory

post-card denials identify that date. Because the state has no readily identifiable past event – i.e., triggering point – from which to begin its analysis, and certainly no identifiable date by which substantial delay might be determined, the state is incapable of establishing any degree of consistency.

Prior to *Clark* illustrative cases were sparse and sent conflicting messages. *In re Spears*, 157 Cal. App. 3d 1203, 1208 (1984) (18 mos.); *In re Mitchell*, 68 Cal. 2d 258 (1968) (2 yrs); *In re Huddleston*, 71 Cal. 2d 1031 (1968) (2.5 yrs); *In re Saunders*, 2 Cal. 3d 1033 (1970) (5 yrs); and *In re Jones*, 265 Cal. App. 2d 376 (1968) (8 yrs).

More recently, lower courts have examined even more extensive showings. In *Dennis v. Brown*, 361 F. Supp. 2d 1124, 1130 (N.D. Cal. 2005), the court examined 200 California Supreme Court opinions, most of which were post-card denials, and was able to determine that the court applied the timeliness bar inconsistently.

In this case, following the Ninth Circuit's initial remand,[21] the State attempted to demonstrate consistency,[22] but that attempt was unpersuasive. More importantly, the state subsequently disavowed the attempt to show consistency of application. In its brief in the Ninth Circuit, it stated that it was "abandon[ing] the surgery of silent denials proffered in the

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[21] Pet. App. 20.

[22] Clerk's Doc. 95, Motion to Dismiss.

District Court for the sound reasons offered by that Court, namely, a review of silent denials simply requires too much speculation to be useful to answer the inquiry."[23]

In light of that abandonment, it is difficult to find fault in the Ninth Circuit's conclusion that the weight of the evidence supported Martin's position regarding inconsistent application.

Finally, in *Carey v. Saffold*, 536 U.S. 214 (2002), during oral argument the state's attorney general spoke of the triggering point as that of *finality* of the prior proceeding.[24] In *Evans v. Chavis*, 546 U.S. 189 (2006), the Attorney General argued to this Court that the triggering point considered by the state's courts is the *date of conviction*.[25] And, in the present case, the attorney general argued before the district court, and again in the Ninth Circuit, that the triggering date from which to measure delay is in fact the date direct review is final.[26] Walker makes the same argument before this Court. Pet. Br. at 5.

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[23] Pet. App. at 95.

[24] *Carey v. Saffold* Transcript of Oral Argument at 12-13.

[25] *Evans v. Chavis* Transcript of Oral Argument at 5.

[26] In its motion to dismiss, the attorney general focused on the finality of direct appeal as the appropriate triggering date. "[Martin] filed his untimely state high court petition more than four years and six months after his *direct review became final*." Doc. 95 at 18, emphasis added. Equally telling is the state's attempt to establish that no habeas petitions were granted after substantial delay. From a list of 370 it culls 100, "to analyze the time frame between *finality of direct review and the filing of the*

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If the state's lawyers are unable to press their case without an identifiable triggering point, and they are themselves unable to decide which triggering point to advance in argument, how can the state honestly expect a *pro se* petitioner to know? Moreover, if the state cannot, or will not, identify the parameters of, or at least the outside limits beyond which the filing of a claim will be barred, is it reasonable to say fair notice has reasonably been achieved?

C. California's Timeliness Bar Is So Vague On Its Face That It Does Not Fairly Apprise Non-Capital Habeas Petitioners Of Its Requirements

When a state creates an inherently vague or subjective timeliness bar to cut off key rights, fairness suggests some sort of higher burden to establish the practical constraints of the rule, such that litigants know how to shape their conduct.

Otherwise, a federal court is at a loss to evaluate whether the state court is acting appropriately, and consistently, when it declares a petition unreasonably delayed when it files after five years; or one year; or even one month.

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habeas petition[.]" *Id.* at 24. The state makes the identical argument in the Court of Appeals; that measured from the date of finality of direct review, Martin's petition, filed four years and six months after is late. Respondent's Brief at 34, 37.

If states refuse to provide guidance to litigants, federal courts will – as a practical matter – either be unable to evaluate the adequacy of the rule, or be forced to rely upon some sort of common law idea of what terms like "substantial delay" or "reasonableness" might mean. Certainly, federalism concerns are greatly reduced when a state has failed to provide any guidance on what its rule means.

This Court has described vague standards as those "failing 'to provide a person of ordinary intelligence fair notice of what is prohibited . . . '" *Skilling v. United States*, 130 S. Ct. 2896 (2010) (Scalia, J, dissenting) (*quoting United States v. Williams*, 553 U.S. 285, 304 (2008)). Moreover, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926) (citation omitted). *See, Kolender*, 461 U.S. 352. And, as this Court identified in *Hill v. Colorado*, 530 U.S. 703 (2000) (*citing Chicago v. Morales*, 527 U.S. 41, 56-57 (1999)) "[a] statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, a rule will be found to be vague if it authorizes, or even encourages arbitrary and discriminatory enforcement." *Hill*, 530 U.S. at 732. *Grayned v. City of Rockford*, 408 U.S. 104 (1972), tells why:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . Second . . . laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned, 408 U.S. at 108-09 (citations omitted).

California's failure to clearly define its timeliness standards has not been lost on members of the California Supreme Court. According to late Justice Mosk, "[t]he procedural bar of untimeliness itself is 'indeterminate at [its] very core.' . . . As such, its application to any given claim may yield varying results, as reasonable persons differ as to whether the claim in question has been presented without 'substantial delay' and, if not, whether 'good cause' exists for any such delay." *Robbins*, 18 Cal. 4th at 817, n.3 (Mosk, J., concurring) (citation omitted).

Not only did members of the California Supreme Court clearly see California's failure, the Ninth Circuit also had it quite correct, noting:

> The rule's ambiguity is not clarified by the California Supreme Court's application of the timeliness bar, in part because the court

> usually rejects cases without explanation, only citing *Clark* and *Robbins*.

King v. Lamarque, 464 F.3d 963, 966 (9th Cir. 2006).

Four years after the Policies in capital cases were announced the California Supreme Court conceded the vagueness and arbitrary application of its timeliness standard in capital cases. *Clark*, 5 Cal. 4th 750. The court's review of habeas petitions in *Clark* led it to a simple but unassailable conclusion: "*no clear guidelines* have emerged in our past [habeas] cases." *Id.* at 763. Five years later, in *Robbins*, 18 Cal. 4th 770, another capital case, the California Supreme Court addressed the level of specificity required to demonstrate the absence of substantial delay, but without providing prospective petitioners with a definition of what constitutes such delay.[27]

Although refusing to acknowledge the extent, or the effect of the differences between capital and non-capital habeas rules, the state has agreed that the two are in fact treated differently. *See, Evans v. Chavis*, 546 U.S. 189, 192-201 (2006), Justice Stevens, concurring in the result:

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[27] *Gallego*, 18 Cal. 4th 825 (deciding whether delay was justified when an attorney representing a *capital* defendant abandons his client). *Sanders* does acknowledge that, "we enforce time limits on the filing of petitions for writs of habeas corpus in non-capital cases." *Sanders*, 21 Cal. 4th at 703. *Sanders*, however, fails to discuss what those time limits are or whether the capital habeas standards might be applicable to non-capital cases, a particularly telling omission given the fact that the Policies' presumption is applicable only to capital habeas petitioners.

> As California's Deputy Attorney General pointed out at oral argument . . . in capital cases . . . the California Supreme Court has adopted separate rules for [capital] cases. See, Tr. Of Oral Arg. 63.

Id. at 198.

And this Court, because of the very uncertain reach of California's time standard in non-capital cases, suggested that, "[t]he California courts might alleviate the problem by clarifying the scope of 'reasonable time' or by indicating, when denying a petition, whether the filing was timely." This Court suggested that the Ninth Circuit "might seek guidance by certifying a question to the State Supreme Court in an appropriate case." *See, Evans*, 546 U.S. at 199.

In *Chaffer v. Prosper*, 592 F.3d 1046 (9th Cir. 2009), the Ninth Circuit did just as this Court suggested and issued an order requesting certification of two questions to the California Supreme Court. *Chaffer v. Lockyer*, S166400, Order, March 11, 2009.

The first question requested clarification with respect to time limits and the concept of "substantial delay."

(1) "When is a state habeas petition timely filed in California courts; does the term 'substantial delay,' as described in *In re Stankewitz*, 40 Cal. 3d 391, 396-97 n.1 (1985), mean *any* delay that exceeds 60 days after the denial of a habeas petition by another state court, as suggested by *Chavis*, 546 U.S. at 200-01?" *Chaffer v. Prosper*, 542 F.3d 662, 663 (9th Cir. 2008).

The second question spoke to asserted justification for delay.

(2) "If either Chaffer's state habeas petition before the California Court of Appeal or his state habeas petition before the California Supreme Court was 'substantially delayed,' was the delay justified?" *Id.*

The California Supreme Court denied certification, issuing an order that the request was,

> denied because a decision by this court is unlikely to be determinative in the federal proceedings and there is controlling precedent on the question of timeliness.

Chaffer v. Lockyer, S166400, Order, March 11, 2009.

Just as it has been the California Supreme Court's position in the past, Walker argues now that *Clark's* decree is incontrovertible, an unassailable bellwether of clarity establishing once and for all that all habeas cases, capital and non-capital alike are bound by the same standard. *See,* Pet. Br. at 35. And here again Walker also insists the standards for both capital and non-capital habeas rules are identical, ignoring its concession in *Evans* that there is a difference. Doggedly determined, the state offers but a single citation, *Clark* (followed by a footnote extolling, "California's clear pronouncement that capital and non-capital litigants are treated the same *once the presumption of timeliness passes* . . . ") Pet. Br. at 35 n.3.

First, the state argues from a false premise: that there is, in non-capital cases, a "presumption of timeliness." There is not. Second, Walker's argument fails because in capital cases there is an identifiable triggering point; in non-capital cases there is none.[28] Again, the Ninth Circuit got it absolutely right when, in *King*, 464 F.3d at 966, it said:

> There are no standards for determining what period of time or factors constitute "substantial delay" in noncapital cases. There are also no standards for determining what factors justify any particular length of delay.

Former California Supreme Court Justice Brown, speaking of California's timeliness standards recognized the problem, stating categorically that [the state's] are, "impossibly amorphous standards." *Gallego*, 18 Cal. 4th at 849 (Brown, J., concurring in part and dissenting in part). Former Justice Brown also found that the California Supreme Court's explanations in *Clark*, *Robbins*, and *Gallego* were "equally nebulous as well as riddled with exceptions requiring fact-specific analysis." *Id.* After examining *Clark* in detail, former Justice Brown concluded that its,

> imprecise, circular, and tautological language does not define a "clear" rule this court can "consistently appl(y)" to create a "well-established" standard. (*Morales*, supra, 85

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[28] Other than that a petitioner should file without "[d]elay . . . measured from the time a petitioner becomes aware of the grounds on which he seeks relief." *Clark*, 5 Cal. 4th at 765 n.5.

> F.3d at p.1393). Nor does it even provide guidance.

Id. at 850.

Conversely, and similar to other limitation statutes, AEDPA addresses these problems traditionally and precisely, setting forth four possible triggering events.

Under the ordinary provision of AEDPA, within one year from the date the judgment becomes final on appeal, petitioner must complete preparations as thoroughly as possible and present the resulting claims to federal court.[29] A habeas petitioner is thus able to verify precisely when his petition is due. The final triggering event is limited to those circumstances where a petitioner had no reason to believe that the factual predicate for the claim existed until its chance discovery.[30]

California's complete lack of meaningful guidance leaves petitioners investigating potential claims without any reliable basis for determining how they

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[29] 28 U.S.C. § 2244(a)(1)(A). With respect to each of the statute's additional ways in which claims may fall outside of the ordinary course of events, the statute dictates filing within one year of discovery. 28 U.S.C. §§ 2244(d)(1)(A)-(D).

[30] *See, e.g.*, *Wilson v. Beard*, 426 F.3d 653 (3rd Cir. 2005) (clock began when petitioner learned of a videotape showing trial prosecutor explaining how to successfully utilize peremptory challenges to remove African-American prospective jurors from the jury); *Hasan v. Galaza*, 254 F.3d 1150 (9th Cir. 2001) (clock began to run when petitioner learned one of petitioner's jurors had romantic ties to a prosecution witness).

should balance the conflicting demands of presenting each individual claim promptly but also presenting all claims in a single petition. The state offers nothing to guide petitioner's efforts, leaving petitioner bereft of the means to determine how to balance the requirements of presenting individual claims promptly against the conflicting demand to present all claims in a single petition. Thus, California's timeliness standards provide no reasonable basis for assessing the risk of forfeiting all future claims by halting an investigation against the risk of forfeiting all claims, current and future, by continuing the investigation.

Delay entails more than the mere passage of time. In the context of timeliness rules, *delay* would seem to suggest that petitioner took somewhat more time than he or she should have taken to complete a task. *See, e.g.*, American Heritage Dictionary (4th ed. 2001) at 230 (defining "delay" as "caus[ing] to be later or slower than expected or desired"); *accord* Webster's Unabridged New International Dictionary of the English Language (3d ed. 1981) at 595 ("to cause to be slower or to occur more slowly than normal"). However, California's timeliness standards, and cases addressing them, say nothing about how long any of these tasks should, under usual circumstances, take to complete, and thus provide no guidance to petitioner regarding how much time to allocate to completing such tasks.[31]

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[31] The fact the state refuses to define what constitutes a "reasonable time" is particularly vexing. Recognizing its failure,

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and the undeniable need for an unambiguous limitations period, the state's lawyers have, on at least two occasions, attempted to cajole this Court into doing the state's work for it. In *Carey v. Saffold* the state, and its amici, proposed that this Court *adopt* the same time period used for the filing of notices of appeal – 60 days. *Carey v. Saffold*, Transcript of Oral Argument at 19. This Court correctly determined that that decision was properly left to the state to decide. *Carey v. Saffold*, Transcript of Oral Argument at 19.

In *Evans v. Chavis*, while confessing the call for a predetermined limitation period, once more suggested this Court *adopt* a 60 day *presumption* of timeliness. Again for the same reasons expressed in *Saffold*. And, once again this Court sensibly declined to adopt the state's submission. *Evans v. Chavis*, Transcript of Oral Argument at 3-5, 11, 22-24. Such a scheme is grossly unreasonable in any event. In California, following sentencing, a defendant's *notice of appeal*, a one page document, must be filed *by trial counsel* within 60 days of sentencing. *See*, Cal. Penal Code section 1240.1. Appellant is then appointed counsel to assist him on appeal. Investigation and preparation and filing of a petition of a habeas corpus is far more daunting, a fact recognized by this Court *Harris v. Nelson*, 394 U.S. 286 (1969).

> [T]his Court has emphasized, taking into account the office of the writ and the fact that the petitioner, being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition, that a habeas corpus proceeding must not be allowed to founder in a "procedural morass."

This very logical and simply stated fact is acknowledged by the California Supreme Court.

> It would be grossly unfair, however, to impose this difficult task [investigation and filing of a habeas corpus petition] on petitioner himself, an indigent death row inmate who is untrained in the law and statutorily entitled to appointed habeas corpus counsel. The advantages of having an experienced attorney prepare

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The purported explanation that "[d]elay 'is measured from the time the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis of the claim,'" is no explanation at all. The attempt to identify the starting point for gauging delay does nothing to define *delay* itself.

In the usual scheme of things a "time bar" is defined as: "a bar to a legal claim arising from the lapse of a defined length of time, esp. one contained in a statute of limitations."[32] While it is true that

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> and file a habeas corpus petition were succinctly summed up in a prior decision of this court: "[W]ith their formal legal training, professional experience, and unrestricted access to legal and other resources, counsel possess distinct advantages over their inmate clients in investigating the factual and legal grounds for potentially meritorious habeas corpus claims and in recognizing and preparing legally sufficient challenges to the validity of the inmates' death judgments."

In re Barnett, 31 Cal. 4th 466, 477 (2003); *In re Morgan*, 50 Cal. 4th 932 (2010).

A newly convicted defendant, in custody, without the assistance of counsel simply is unable to proceed with the diligence demanded of him in non-capital habeas cases. An excellent first-hand account of a prisoner's first six months following conviction is set forth in the two following URL's from California PrisonTalk and are somewhat instructive. http://www.prisontalk.com/forums/showpost.php?p=1125588&postcount=36; http://www.prisontalk.com/forums/showthread.php?s=&threadid=15736.

[32] Black's Law Dictionary 708-09 (Bryan A. Garner ed., 2nd pocket ed. 2001).

many statutes of limitations are defined as a period of time beginning at that point in time when plaintiff either knew or should have known the onset of injury or harm, virtually all are also possessed of a defined end point, thus providing clear notice of the length of time a plaintiff or claimant has to perfect his case.

In California, in non-capital cases, a petitioner is told that he must file within a "reasonable time" and "without substantial delay" following the identification of a meritorious claim. Unfortunately, "reasonable time" and "substantial delay" at least in this context, are meaningless terms.

If time is viewed as a measurement between two sequenced events,[33] it stands to reason that unless *both* events are specifically and clearly identified there can be no realistic measurement of time between them.[34]

Assume for a moment petitioner has identified his claim – the first event in the sequence. In the present framework of things, California has steadfastly refused to identify the second event in the sequence – the date upon which petitioner's claims will be defaulted if not filed. Since the second event in

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[33] As it is in the usual statute of limitations cases.

[34] Black's Law Dictionary defines "time" as: "a measure of duration." Black's Law Dictionary 708-09 (Bryan A. Garner ed., 2nd pocket ed. 2001). The Internet Encyclopedia of Philosophy states it this way: "Time is what clocks measure. We use time to place events in sequence one after the other, and we use time to compare how long events last." http://www.iep.utm.edu/time/.

the sequence – the date of default – is unidentified, the petitioner's claims, when they eventually are filed are neither early, nor delayed, nor substantially delayed. This is so because the time between the two events (identified basis of claim and default) cannot be measured.

Walker suggests that since in other contexts the *reasonable time* has been held to be sufficiently specific, it should be here as well.[35] The suggestion is of limited utility here.

As this Court has instructed, how specific something must be, or indeed even can be, depends almost entirely on the context.[36] In fact, words that are indefinite in meaning can provide adequate notice only if they are "well understood in common parlance," *Scales v. United States*, 367 U.S. 203, 223 (1961), or

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[35] Petitioner cites four illustrative cases that have nothing, or nearly nothing, to do with an issue of notice but simply refer to concepts such as: "substantial" "asportation," or lack of "reasonable" diligence in filling out Securities and Exchange filings. Pet. Br. at 38 (*citing American Motorcycle Assn. v. Superior Court*, 20 Cal. 3d 578, 586 (1978); *Feit v. Leasco Data Processing Equipment Corp.*, 332 F.Supp. 544, 568 (EDNY 1971); *People v. Blakeley*, 23 Cal. 4th 82, 87-88 (2000); *People v. Nguyen*, 22 Cal. 4th 872, 885-86 (2000)).

[36] Many legal terms have meaning that is provided by context. *Clay v. United States*, 537 U.S. 522, 527 (2003). *Jimenez v. Quarterman*, 129 S. Ct. 681, 685 (2009): Indeed, "'meaning – or ambiguity – of certain words or phrases may only become evident . . . in context.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), *quoting FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

have an established meaning in a particular trade or business subject to regulation. *See McGowan v. Maryland*, 366 U.S. 420 (1961).

Notably, Walker has never attempted to identify that particular point in time when the permissible period for Martin to file his claims expired, i.e., when his default occurred, and for good reason. The answer exists only in the eye of the beholder, but it is a vision never shared with the parties let alone the public, let alone this Court. The state's timeliness standards make it impossible for any petitioner adequately to "foresee," "foreshadow," or "adequately guard against" an adverse result. Lacking any meaningful guidance the state's timeliness standard places habeas petitioners in a continuous state of uncertainty with respect to just when they should file their petitions.

III. This Court Should Reject The State's Request To Employ Martin's Case As A Vehicle For Consideration Of Proposals To Reshape The Longstanding Adequate State Ground Doctrine

A. Walker's Ill-Advised Request Would Result In A Radical Change In A Variety Of Civil And Criminal Contexts

Walker's ill-advised request would result in a radical change in a variety of civil and criminal contexts and would adopt, for non-capital habeas corpus cases, a rule Congress has rejected. Moreover,

this case presents a very poor vehicle for such sweeping revisions in that: (1) California timeliness requirement, although addressing a commonly recurring situation, does so in the most uncommon of ways; (2) shifting to a "fair notice" model of adequacy would affect neither the outcome nor the fundamental analytic approach in this case.

The adequate state ground doctrine is not unique to habeas cases, finding precedent in civil, criminal and administrative proceedings.[31] Walker proposes that this Court redefine this well-established body of law to make fair notice the "touchstone" for adequacy. Pet. Br. at 18.

But "notice" has never been the sole measure of adequacy of a state procedural bar. "Fair notice" is a threshold element of Due Process.[32] If the cases had

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[31] *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 123-125 (1990); *Philadelphia Newspapers, Inc. v. Jerome*, 434 U.S. 241 (1978); *Brown v. Western Railway of Alabama*, 338 U.S. 294, 296 (1949); *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 397-399 (1990); *Film Corp. v. Muller*, 296 U.S. 207, 210-211 (1935)

[32] *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("elementary and fundamental requirement of due process" is "notice . . . and . . . opportunity" to be heard); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), *quoting Baldwin v. Hale*, 1 Wall. 223, 233 (1863) (the "central meaning of procedural due process" is right "to be heard"; in order to "enjoy that right [party] must first be notified").

meant to say that the test of adequacy of a state procedural bar is whether it violates Due Process, the cases would have so held.

Walker's proffered support for its radical request is insubstantial, consisting largely of an attempt to re-examine much of this Court's adequacy jurisprudence in the light of the proposed fair notice test.[39] That a "fair notice" framework fits with many of this Court's decisions is hardly surprising. "Fair opportunity to present federal claims" has been recognized as "the most generally functional test" for one line of adequacy cases. C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure (2d ed. 1996), § 4027 at 320). Indeed, the leading treatise on this court's practice fails even to mention "fair notice" as a separate test of adequacy, instead discussing petitioner's cases within the context of a more general discussion of "untenable" state grounds. *See* E. Gressman, et al., Supreme Court Practice, ch. 3.26 at 223-226 (9th ed. 2007).

The historical and conceptual basis for the requirement of consistency in state procedural rulings that bars the merits of federal claims is not merely to

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[39] *See* Pet. Br. at 19-21 (discussing *Patterson*, 357 U.S. at 457; *Wright*, 373 U.S. 284; *Johnson*, 486 U.S. 578; and *James*, 466 U.S. 341).

provide litigants fair notice but to prevent state courts from declining to enforce federal rights.[40]

Walker acknowledges that the adequate state ground doctrine is intended to protect litigants against the arbitrary or discriminatory invocation of state court rules of procedure to extinguish federal constitutional rights. Pet. Br. at 22-24. But its simplistic proposal to limit the adequacy inquiry to the existence of notice and a legitimate state interest would allow just that kind of evasion.

Petitioner next contends that federal courts should not look at the consistency *vel non* of state court practice and that most of this Court's precedents can be explained under its notice based rule. Pet. Br. at 25-28. Neither contention is well founded. In fact, this Court almost always considers the consistency of state court practice in determining whether a state court procedural ruling is adequate.[41] Abandoning consideration of actual state court practice in favor of a rule focused merely on notice would

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[40] *See Ward v. Board of City Commissioners of Love City*, 253 U.S. 17 (1920); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923); *Patterson*, 357 U.S. at 454-458; *NAACP v. Alabama ex rel. Flowers*, 377 U.S. at 293-301; *Wright*, 373 U.S. 284; *Ford*, 498 U.S. at 421-425.

[41] *See Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190, 194-95 (1925); *Staub*, 355 U.S. at 320; *Patterson*, 357 U.S. at 456; *Wolfe v. North Carolina*, 364 U.S. 177, 188-91 (1960); *Flowers*, 377 U.S. at 297; *Barr*, 378 U.S. 146; *Hathorn*, 457 U.S. at 263; *James*, 466 U.S. at 348-49; *Johnson*, 486 U.S. at 587-89; *Dugger*, 489 U.S. at 410.

reverse many decisions, both in habeas and direct review cases. For example, in *Staub*, *Flowers*, *Barr*, *Hathorn*, *James* and *Johnson*, the state courts relied on codified or otherwise generally applicable rules. Thus, the petitioners in those cases had notice of the rule and an opportunity to comply with it – but in practice, the state courts had not consistently or regularly relied on the rule to deny review.

This Court has similarly, and very recently, rejected as inadequate state court procedural bar rulings that had no fair or substantial support. *See Cone v. Bell*, 129 S. Ct. 1769, 1780 (2009) (state court ruling that claim was "previously determined" "rested on a false premise"); *Lee*, 534 U.S. at 382 (novel application of existing rule to circumstances "Missouri courts had not confronted before"). In both these cases, notice of the rule existed, but notice was ultimately irrelevant.

Walker also claims the "undeniable good faith" of the state courts will dependably ensure the enforcement of federal law, Pet. Br. at 12, and he may be correct that overt manifestations of racial bias by state courts are now a rarity. However, the elected state judiciaries are more vulnerable to majoritarian and other pressures than the judiciary of the United States. *See, e.g.*, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (elected judge should have recused himself faced with risk of bias created by his receipt of substantial donation from litigant's principal). *See also, Judges in the Culture Wars Crossfire: The 'Least Dangerous Branch' is Becoming the Most*

Vilified Branch, 91 American Bar Association Journal 44 (October 2005). Only 20 years ago the electorate dramatically changed the makeup of the California Supreme Court as a result of widespread dissatisfaction with the justices' receptivity to the assertion of federal constitutional rights. *See* Uelmen, Gerald F., *Review of death penalty judgments by the Supreme Courts of California: a tale of two courts*, 23 Loy. L. Rev. 237 (1989).[42] Given the relative freedom of the federal judiciary from improper financial incentives and the political debates of the day, this Court's existing analysis of adequacy, applied to the actual practice of the state courts provides a surer safeguard of federal constitutional rights that the truncated analysis that Petitioner proposes.

This Court has explicitly applied the adequate state ground doctrine to habeas proceedings since its decision in *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). The Court reiterated that the doctrine applies to habeas proceedings in *Coleman*, 501 U.S. at 729-30.

The passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996, although in

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[42] *See also, Article: Judicial Reaction to Change: The California Supreme Court Around The 1986 Elections*, 13 Cornell J.L. & Pub. Pol'y 405 (2004) (discussing retention election system and its impact on California's judiciary); *see also*, B. Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977) (advancing argument that federal courts are more favorable than state court for litigants seeking to vindicate federal rights).

some respects did limit a state prisoner's access to a federal forum for the independent review of federal claims, did nothing to abrogate this absolute right to do so or the adequate state ground doctrine. Indeed, just as had Section 2254 pre-AEDPA, AEDPA still specifically provides that the federal courts are available to state prisoners through the writ of habeas corpus for violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a). Significantly, during the debate of the statute, an amendment was offered by Senator Kyl of Arizona that would have denied lower federal courts the right to review claims that had been brought under a state system that was both adequate and effective for addressing those claims.[43] The amendment would have limited review to the filing of an appeal, or an original habeas petition in the United States Supreme Court. It is noteworthy that the Senate declined to adopt Senator Kyl's scheme of things or to otherwise modify the adequate state ground doctrine.

The limited action Congress actually took is telling, and this Court should decline to adopt Walker's proposed rule, when Congress clearly did not intend such a result.

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[43] Congressional Record S7828 (Daily Ed. June 7, 1995).

B. This Case Is A Particularly Poor Vehicle For Wholesale Revisions Of The Adequacy Doctrine

This Court is being asked to completely abandon the established adequacy analysis normally applicable in scrutinizing a state rule for the sake of a single state's indeterminate rule that operates far outside the mainstream of state "timeliness" rules. It is a rule that this Court has found to be so ill-defined that it has suggested that the California legislature would do well to conform its rules to the law of most other States, *see Evans,* 546 U.S. at 199, since at present the rule's uncertainty often renders a court's application of it "unanswerable." *Carey,* 536 U.S.at 236 (Kennedy, J., dissenting). It is, moreover, a rule that the California Supreme Court has explicitly declined to clarify through the certified question procedure, *see Chaffer,* 592 F.3d at 1048 n.1, even when that request was made at this Court's behest. *Evans*, 546 U.S. at 199. California's rule has not therefore been demonstrated to be like the rule in *Wainwright* that clearly served "many interests in its own right." *Wainwright,* 433 U.S. at 88. Nor are the interests of federal-state comity overall well-served by entertaining the demands of a state whose Supreme Court has declined to reciprocate the federal courts' willingness to respect its rules, even by answer to a federal court's direct question.

Within its last Term, this Court declined to reevaluate the circumstances under which federal courts would abstain from exercising review under

28 U.S.C. § 2254(a) on the ground that an atypical default rule is "unsuitable for providing broad guidance on the adequate state ground doctrine." *Beard,* 130 S. Ct. at 619. The contemporaneous objection rule at issue in *Wainwright*, which was "by no means peculiar" to one state, merited respect, "both for the fact that it is employed by a coordinate jurisdiction . . . and for the many interests which it serves in its own right" such as clarification of the trial record and the possibility of earlier finality to litigation if objectionable evidence is excluded. *Wainwright,* 433 U.S. at 88.

Petitioner also contends that the adequacy of a state court procedural ruling should be presumed, and Martin concurs that, initially at least, such a presumption should prevail. Indeed, it is difficult to conceive of a functional legal system where statutes or court-created rules had to be demonstrated as valid before they could be applied.

The Ninth Circuit's approach has, in fact been to accord a presumption of regularity to state court rules, including its untimeliness rule. That does not mean, however, the parties will not be required to follow the usual rules applicable to affirmative defenses. *See*, *Bennett*, 296 F.3d at 763.

Petitioner seems virtually alone in believing that the work of the federal courts is rendered "treacherous and untenable" by the Ninth Circuit's approach in this case, Pet. Br. at 10, or that the rule is otherwise unworkable. In other cases of recent vintage concerning the adequate state ground rule

concerned litigants flocked to present their position. In the direct review case of *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), thirteen *amici* with potentially affected interests filed briefs, including CJLF and a group of eight of the States.[44] In *Lee*, 534 U.S. 362, a habeas case, and in *Beard*, 130 S. Ct. 612, amicus briefs were again filed by CJLF and some of the states.[45] In *Beard*, however, the overriding issue was the validity of discretionary procedural rules, a matter of concern to more than one State.

In the present case, Walker is joined only by CJLF, perhaps demonstrating that California's rule lies so far afield of the procedural rules of other jurisdictions that protecting it is not of any wider interest.

C. Adopting Petitioner's "Fair Notice" Approach To Adequacy Would Not Change The Outcome Or The Analytical Approach To This Case

Lack of notice and inconsistency are joint concepts in this Court's vagueness jurisprudence. The

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[44] *See* Brief of the State of Oregon et al., *Amici Curiae* in Support of Respondent, filed October 9, 2008 in *Philip Morris USA v. Williams*, Docket No. 07-1216.

[45] *See* Brief of the State of Nebraska et al., *Amici Curiae* in Support of Respondent, filed July 13, 2001 in *Lee v. Kemna*, Docket No. 00-6933; Brief of the State of California et al., *Amici Curiae* in Support of Respondent, filed October 9, 2008 in *Beard v. Kindler*, Docket No. 09-992.

requirement that rules be stated with sufficient definiteness that ordinary people can understand what conduct is prohibited is largely to ensure against arbitrary and discriminatory enforcement. *Kolender*, 461 U.S. at 357-358; *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned*, 408 U.S. 104. Although the vagueness doctrine focuses both on actual notice to citizens and arbitrary enforcement, this Court has noted that the more important aspect "is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith*, 415 U.S. at 574. "The vices – the lack of guidance to those who seek to adjust their conduct and to those who seek to administer the law, as well as the possible practical curtailing of the effectiveness of judicial review – are the same." *Interstate Circuit*, 390 U.S. at 689-690.

California has failed to provide even minimal guidelines and thus has failed to provide notice sufficient to bar federal review.

IV. The Extreme Proposals Of Amicus CJLF That All Prevailing Adequate State Ground Doctrine Be Scrapped Or Radically Revamped Are Not Properly Before The Court In This Case

CJLF makes two submissions that go beyond the arguments advanced by the State of California. These are epitomized by "Questions Presented" 2 and 3 in

its amicus briefs at the merits and certiorari stages. Under its "Question Presented" Number 3, it argues that the adequate and independent state ground rule which has been a fixture of federal habeas corpus law for decades should be "abandoned altogether." Under its "Question Presented" Number 2, it argues that the rule should be radically reformulated and turned into a "fair notice" rule, an innovation that would jettison this Court's extant jurisprudence on the subject.

Neither of these submissions can be considered by the Court consistently with *Illinois v. Gates*, 462 U.S. 213 (1983). The holding of *Gates* is that when a case "is before us on the State's petition for a writ of certiorari," there is "no reason to treat the State's failure to have challenged an asserted federal claim differently from the failure of the proponent of a federal claim to have raised that claim." *Id.* at 221.

In *Gates*, the State of Illinois "had challenged, at every level of the Illinois court system, . . . [Gates'] claim that the substantive requirements of the Fourth Amendment had been violated. The State never, however, raised or addressed the question whether the federal exclusionary rule should be modified in any respect, and none of the opinions of the Illinois courts give any indication that the question was considered." *Id.* at 220-221. This Court held that under those circumstances, it could not properly use the case as a vehicle for considering whether the extant Fourth Amendment exclusionary rule itself should be significantly modified.

Here, the State of California argued in the lower courts that it, rather than Martin, was entitled to prevail when this Court's rules relating to the adequacy of a state-law ground of decision were applied to the facts of the case at bar. California never argued that those rules should be modified and the courts below never considered any request for their modification. Had California proposed any significant change in the long-standing principles governing adequacy of a state procedural ground, the case would not be coming to this Court from a four-page, unpublished Ninth Circuit opinion which does no more than apply those principles to the facts. California's certiorari petition continued to present the case as one in which the problem for correction was the Ninth Circuit's purportedly improper application of settled adequate state ground principles.[46] It did not ask that those principles be "abandoned altogether" or radically revamped. Under *Gates*, this Court itself would not consider abandoning or radically revamping its longstanding rules in this

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[46] California's certiorari petition presented to this Court, the question whether California's "state law . . . [under which] a prisoner may be barred from collaterally attacking his conviction when the prisoner 'substantially delayed' filing his habeas petition . . . is 'inadequate' to support a procedural bar because (1) the federal court believes that the rule is vague and (2) the state failed to prove that its courts 'consistently' exercised their discretion when applying the rule. . . ." The petition asked this Court to clarify the extent to which the element of discretion in a state procedural-bar rule renders that rule "inadequate" within long-standing adequate-and-independent-state-law-ground principles.

case. It should certainly not do so at the instance of a non-party which has presumed to add two *amicus*-concocted questions to those presented by the certiorari petition and by the proceedings below.

And, worth noting is the fact that *amicus* is not entitled to present additional question. *United Parcel Service v. Mitchell*, 451 U.S. 56, 60 n.2 (1981).

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be confirmed.

Dated: October 20, 2010

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REPLY BRIEF

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In The Supreme Court of the United States

JAMES WALKER, WARDEN, ET AL.,

Petitioners,

v

CHARLES W. MARTIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

INTRODUCTION

A Petitioner's default under a state procedural rule is adequate to bar his claim in federal habeas corpus proceedings if the rule affords fair notice of what is required of the litigant to obtain merits review of the claim in state court and advances legitimate state interests. State procedural rules provide the requisite fair notice if they are "firmly established and regularly followed" *James* v *Kentucky*, 466 U.S 341, 346 (1984), *NAACP* v. *Alabama Ex Rel Patterson*, 357 U.S 449, 457 (1958). A petitioner's failure to comport with a state procedural rule that provided fair notice of its requirements may be deemed inadequate only when the state had no legitimate interest in the rule's enforcement. *Osborne* v. *Ohio*, 495 U.S. 103, 124 (1990); *James* v *Kentucky*, 466 U.S., at 349, *Michigan* v. *Tyler*, 436 U.S. 499, 512, n 7 (1978). "Most state procedures are supported by various legitimate interests, so established rules have been set aside only when they appeared to be calculated to discriminate against federal law. . . ." *Lee* v *Kemna*, 534 U.S. 362, 391-92 (2002) (Kennedy, J , Dissenting).

Comity and federalism require federal courts to presume the adequacy of state procedural rulings; the petitioner should bear the burden of rebutting the presumption. See *Lee* v. *Kemna*, 534 U.S., at 375; *Central Union Telephone Co.* v. *City of Edwardsville*, 269 U.S 190, 195 (1925) For "[s]tate courts are duty bound to give full effect to federal constitutional

rights and it cannot be assumed that they will be derelict in their duty." *Wade* v *Mayo*, 334 U.S. 672, 679 (1948); see also *Coleman* v *Thompson*, 501 U S. 722, 731 (1991).

An alternative presumption—that the state court imposes its procedural bars irregularly so as to defeat fair notice or fails to advance legitimate state interests—is indefensible. Presumptions should, after all, reach the correct result most of the time; and it cannot be said that state procedural rules fail to accord fair notice or advance legitimate state interests on the majority of occasions in which they are imposed. *Coleman* v. *Thompson*, 501 U.S., at 737

B. Under this Court's "adequacy" precedents, then, California's habeas corpus timeliness rule is adequate It affords litigants fair notice of what is required of them to obtain merits review of their federal claims in state court, and it advances legitimate state interests Under the California rule, habeas corpus litigants must bring their state collateral challenges "as promptly as the circumstances allow," and they must explain with specificity when they learned of their claim and what reasons, if any, prevented them from raising the claim sooner. *In re Gallego*, 18 Cal.4th 825, 832-33, 959 P 2d 290, 295-96 (1998); *In re Robbins*, 18 Cal.4th 770, 795, n.16, 959 P.2d 311, 327, n.16 (1998); *In re Clark*, 5 Cal 4th 750, 765, n.5, 855 P.2d 729, 738, n.5 (1993). A finding of untimeliness in this context, then, has two components (1) unreasonable delay; and (2) inadequate justification. As reflected in this Court's precedents, such a rule of reasonableness

suffices to give fair notice. In addition, California's timeliness rule advances its legitimate interests in preserving scarce judicial resources and protecting the finality of its criminal convictions. *In re Clark*, 5 Cal.4th, at 766, 770, 855 P2d, at 739, 742; *In re Harris*, 5 Cal 4th 813, 831, 855 P2d 391, 399-400 (1993).

Though Martin claims confusion regarding the length of "substantial delay," he cannot credibly argue that his own delay in this case was not substantial. The claims Martin advanced in his second state high court habeas corpus challenge stemmed exclusively from his trial and direct appeal proceedings which occurred in 1995 and 1997 respectively Despite presenting an earlier state high court collateral challenge in 1998, Martin never adequately justified why he waited until 2002 to present his additional claims which were known or knowable at the time of his trial and direct appeal. Joint Appendix (JA) 11-12.

C Martin and amici curiae supporting him argue that the State here seeks to "replace" the existing body of "adequacy" law with only a "fair notice" requirement.[1] RBOM 18, 51-52, 57; ABFCS 2-5, 9-10; ABCM 5-6, 10, 17. As explained here and in the State's merits brief (Petitioner's Brief on the

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[1] Martin's Responding Brief on the Merits will be referred to as RBOM, the Amicus Brief by the Habeas Corpus Resource Center will be referred to as ABHCRC, the Amicus Brief by the Federal Defenders will be referred to as ABFD, the Amicus Brief by the Federal Courts Scholars will be referred to as ABFCS, and the Amicus Brief on behalf of Cory Maples will be referred to as ABCM

Merits (PBOM) 9-11, 17-24), however, the State merely advocates a "fair notice and legitimate state interest" formulation of the test that is well grounded in this Court's jurisprudence. In contrast, Martin and those amici appear to advocate for consistency merely for consistency's sake. RBOM 29-36; ABFCS 14-16 Instead, inquiry into "consistency" in a rule's application is a tool suited for the purpose of the adequacy requirement Thus the inquiry is aimed, not at ensuring consistency for consistency's sake, but at determining whether a procedural rule provides adequate notice and advances legitimate interests.

Martin and the amici supporting him also argue that the California timeliness rule is unclear because it is based upon a standard of reasonableness. RBOM 13, 15-16, 18, 37-50; ABHCRC 4-12, 15; ABFD 17-24. But this Court has endorsed similar rules of reasonableness that require diligence and promptness from litigants. Indeed, entire landscapes of American jurisprudence rely on rules requiring reasonableness in a variety of contexts.

Finally, Martin and amicus curiae Federal Defenders seek to revisit this Court's grant of certiorari in this case and to quarrel with the logical placement of the burden of proving that a facially neutral and unremarkable state procedural rule is nonetheless "inadequate." As also explained below, however, their arguments are unavailing.

ARGUMENT

I. Martin's Proposed Standard For Measuring Adequacy Misconstrues This Court's Precedents And Places Too Heavy An Emphasis On Second Guessing The Mere Consistency Of The State Court's Application Of Its Procedural Rule.

A Martin argues that the State seeks to "replace" the existing body of "adequacy" law with only a "fair notice" requirement RBOM 18, 51-52, 57 As explained here and in the State's merits brief (PBOM 9-11, 17-24), however, the State instead advances a "fair notice and legitimate state interest" formulation of the test that is firmly rooted in this Court's jurisprudence Martin suggests that confusion would ensue from adoption of the State's argument. RBOM 18. But he provides no explanation why

B. Aside from failing to recognize that the State's interpretation of the adequacy inquiry requires consideration of the legitimacy of the state's interest in its procedural rule, Martin's main criticism proceeds from his wooden view of this Court's concern that the state courts "consistently apply" the challenged procedural rule to the individual claim at issue. RBOM 28-36. In the context of "adequacy," consistent application of the state procedural rule is relevant only to the extent that inconsistency might be so pervasive as to defeat fair notice or to refute any suggestion that the rule advances legitimate state interests. A rule that is rarely invoked when it would normally apply, or that

is suddenly interpreted in a novel manner, likely would not provide state court litigants with sufficient notice that they must comply with the rule or risk default of their claim. When a rule is so rarely invoked, litigants might be deceived into believing that the state courts have abandoned the rule so that it need not be observed. Or, when so rarely applied, the rule might no longer serve a legitimate purpose, but perhaps only a pernicious one Martin's slavish devotion to consistency stems from a fundamental misunderstanding of why this Court sometimes considers how the state courts have applied a procedural rule to similar claims in other cases.

C. Martin cites several of this Court's precedents as support for his view that the federal "adequacy" standard demands some high mathematical level of "consistent application" by the state courts. RBOM 28. The cited precedents instead show that this Court has been concerned with fair notice and discrimination against federal claims or claimants and certainly not with consistency in state law rulings for its own sake. Moreover, in none of the cited cases did this Court engage in the wholesale rejection of a state procedural rule rather than a rejection of the rule as applied on a specific occasion. And none was a 28 U.S C. § 2254 case raising the special federalism and finality concerns that traditionally have limited the scope of the writ.

When this Court has undertaken a "consistency" analysis in a specific case, it has focused on the extent that published authorities from the state are inconsistent with the statement of the rule at issue.

Thus, in *Staub* v. *City of Baxley*, 355 U S. 313, 318, 320 (1958), this Court considered "a long line of [state court] decisions" that had established a rule that was inconsistent with what had been imposed in that case by the state court Similarly, in *Barr* v. *City of Columbia*, 378 U.S. 146, 149-50 (1964), this Court noted that four other published state cases decided within months had squarely contradicted the approach taken by the state Also, in *Johnson* v. *Mississippi*, 486 U.S 578, 588-89 (1988) and *James* v. *Kentucky*, 466 U.S., at 346-49 this Court concluded that the weight of published state authority contradicted the interpretation given in the current case. And, in *Hathorn* v. *Lovorn*, 457 U.S 255, 263 (1982), this Court found that there was no mention of the pertinent rule in published state authority for two decades In these examples, then, this Court considered prior published state court decisions in the context of evaluating the extent that the state had provided sufficient notice that the rule at issue was going to be applicable in the current case When the current application of the rule is inconsistent with earlier decisions by the state court, then fair notice cannot be said to exist.

D. That is, mere inconsistency in state law rulings, unless it defeats fair notice or suggests invidious discrimination, does not render a neutral and reasonable state procedural rule "inadequate" to support the state judgment in the federal habeas court. As this Court recently held, discretion based procedural rules are adequate. *Beard* v. *Kindler*, 130 S.Ct 612, 618 (2009). They cannot

become inadequate just because of the varied results that inevitably follow from exercises of discretion by different state courts and judges over time.

Martin, however, seems to insist upon consistency merely for the sake of consistency. Based on this premise, Martin presumably would require proof that state courts, in all cases and all circumstances, apply a given procedural rule in the same manner This Court, of course, has never based a finding that a state procedural rule was inadequate upon such an exhaustive review. See *Dugger* v. *Adams*, 489 U.S. 401, 410, n.6 (1989); *Johnson* v. *Mississippi*, 486 U.S., at 587, *Hathorn* v. *Lovorn*, 457 U.S., at 263.

Martin relies on *Prihoda* v. *McCaughtry*, 910 F.2d 1379 (7th Cir. 1990), in support of his consistent application argument. RBOM 28. But the Seventh Circuit's analysis supports the State's position. In *Prihoda*, the court of appeals explained that a state rule basis for a decision may be inadequate in federal court if the rule is followed only infrequently, unexpectedly, or freakishly *Id.*, at 1383 Martin, of course, has provided no evidence that California's timeliness rule has been applied infrequently, unexpectedly, or freakishly. Further, the Seventh Circuit in *Prihoda* specifically recognized the problematic nature of searching for "consistency," explaining that federal court scouring of a state court's application of exceptions to its procedural rules plunges federal courts improperly into questions of state law *Id* , at 1383.

E. The problems inherent in a federal court attempting to scrutinize for consistency the general

application of a state procedural rule in a myriad of cases are demonstrated, ironically, by the survey undertaken by amicus Habeas Corpus Resource Center. ABHCRC 16-36 In that survey, HCRC second guessed the consistency of the California Supreme Court's application of its timeliness rule by considering summary denials of relief by the state court in 157 habeas corpus cases decided on the same day Martin's second petition was denied. Implicit in the HCRC study and in Martin's argument, also, is the notion that an evaluation of "adequacy" must involve such a dubious yet exhaustive and intrusive inquiry Surely, this Court should doubt the validity of any view of "adequacy" that would result in sentencing federal courts to the hard labor of undertaking such improbable scrutiny of a myriad of state court decisions. As the district court noted below, "There should be no requirement for the undersigned to review the pleadings of tens, or even hundreds of cases, every time a procedural bar motion is made in order to make a judicial speculation of what was in the mind of the state courts." Petition Appendix (Pet. App.) 16, n.6.

Not surprisingly, HCRC reports that it was unable to discern from its strange review any "guidance as to the court's criteria for imposing the timeliness bar." ABHCRC 36 Aside from the unanswered question of whether the one day sample was a representative one, HCRC's "empirical study" suffered from further unwarranted speculation and assumptions. In such a review of "timeliness" rulings in these habeas corpus cases, it cannot be gleaned from a summary ruling when the petitioner's claims became known or

knowable by the petitioners, or what justifications for any delay they might have offered. Nor may one confidently discern from a summary denial imposing a timeliness bar if the petitioner sought to invoke any of the recognized exceptions to the substantial-delay rule. See *In re Clark*, 5 Cal.4th, at 769, n.9, 855 P.2d, at 741, n.9; *In re Robbins*, 18 Cal.4th, at 814, n.34, 959 P.2d, at 340, n.34.

Moreover, HCRC apparently assumed that the California Supreme Court, when simply announcing that it was denying a petition on the merits or on an alternative procedural ground, necessarily found that the petition was "timely." Nothing in California Supreme Court practice supports such an assumption. To the contrary, it would be an appropriate and efficient use of scarce judicial resources for the court to deny a petition on the most expeditious ground without undertaking a potentially more difficult inquiry into timeliness.

F. Martin unjustifiably accuses the State of arguing that it is simply untenable for federal courts ever to "review" a state court's use of its procedural rules. RBOM 31, 33. The State, however, agrees that federal review of state procedural rules, for fair notice and legitimate state interest, is wholly appropriate. What should not be permitted is for federal courts to second guess a state's interpretation of reasonable state procedural rules that afford federal litigants fair notice and do not discriminate against them. Cf. *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975); *Estelle* v. *McGuire*, 502 U.S. 62, 67 (1991). But the Ninth Circuit undertakes such improper second guessing

in invalidating California procedural rules across the board See PBOM at 35, n.3, citing *King* v. *LaMarque*, 464 F 3d 963, 966 (9th Cir. 2006).

Finally, Martin argues that the Ninth Circuit recognizes the adequacy of discretion based rules and that the court of appeals is not mandating "a level of mathematical precision that is inherently inconsistent with the exercise of discretion." RBOM 17, 32, 34. However, the Ninth Circuit's ruling here shows otherwise. It faults California for choosing "to employ an undefined standard of 'substantial delay' in denying state habeas petitions for untimeliness, rather than using fixed statutory deadlines." Pet. App 3; *Townsend* v. *Knowles*, 562 F.3d 1200, 1207 (9th Cir 2009), citing *King* v. *LaMarque*, 464 F.3d, at 966 (impugning California's timeliness rule for being too vague).

II. This Court Should Reject Martin's Argument That The Burden Of Proving Adequacy Should Be Imposed On The State.

Martin recommends that this Court adopt the burden of proof allocation as articulated by the Ninth Circuit in *Bennett* v. *Mueller*, 322 F.3d 573 (9th Cir. 2003), and the Tenth Circuit in *Hooks* v. *Ward*, 184 F.3d 1206 (10th Cir. 1999). RBOM 13, 17, 21-24. But these decisions are ill conceived. The Ninth Circuit took its rule, imposing upon the state the burden of proving adequacy, from the Tenth Circuit. *Bennett* v. *Mueller*, 322 F.3d, at 584-85 (citing *Hooks* v *Ward*, 184 F.3d, at 1217). In turn, the Tenth Circuit gleaned

its *Hooks* burden allocation rule from two California federal district court opinions: *Karis* v. *Vasquez*, 828 F.Supp. 1449, 1463, n.21 (E.D. Cal. 1993) and *Coleman* v. *Calderon*, No C-89-1906-RMW, 1996 WL 83882, at *3 (N D.Cal. Feb. 20, 1996) (Unpublished Order), aff'd on other grounds by 150 F.3d 1105 (9th Cir 1998), rev'd on other grounds by 525 U.S. 141 (1998). *Hooks* v *Ward*, 184 F 3d, at 1216. Both of these district court opinions, however, are based upon the faulty reasoning that discretionary state rules are necessarily infirm. *Karis* v. *Vasquez*, 828 F.Supp., at 1461, 1463; *Coleman* v. *Calderon*, 1996 WL 83882, at *2; see also *Beard* v. *Kindler*, 130 S.Ct., at 618. Martin ultimately relies upon this discredited notion too. RBOM 30.

As explained in the State's opening brief, the burden of establishing inadequacy should be placed upon habeas corpus petitioners Federal courts certainly should not assume that state procedural rulings are infirm and inadequate. Such a presumption would be improper for it would reach the wrong result the majority of the time, see *Coleman* v *Thompson*, 501 U S., at 737; would offend comity and federalism, see *Wade* v. *Mayo*, 334 U.S., at 679, and could thwart Congress' reform of habeas corpus in AEDPA, see PBOM 28-33. To the contrary, this Court refused to engage in a presumption that all state law grounds invoked to support a judgment are dependent upon federal law and inadequate. *Coleman* v. *Thompson*, 501 U S , at 737-38. "Adequacy" logically should be treated the same way. *Central*

Union Telephone Co v *City of Edwardsville*, 269 U.S., at 195 (state court's declaration of its procedural rule "should bind us" unless unfair or unreasonable). Similarly, habeas corpus petitioners bear the burden of proving "cause and prejudice" to lift a procedural bar. *Wainwright* v. *Sykes*, 433 U S. 72, 90-91 (1977). There is no good reason to treat "adequacy" differently.

Of course, procedural default defenses must be raised or they can be lost, see *Gray* v *Netherland*, 518 U.S. 152, 165-66 (1996), and statute of limitations and procedural bar defenses are analogous in this respect See RBOM 13, 20. But it should be enough for the state to assert the state procedural default ruling as a defense; the burden to demonstrate inadequacy should be petitioner's Such a rule is similar to the one in the analogous area of the federal bar against successive petitions. That is, once a state pleads that a petitioner has filed a second federal habeas corpus petition, the petitioner has the burden of showing that he should be excused. *McCleskey* v *Zant*, 499 U S 467, 494 (1991). Similarly, in the federal statute of limitations context (see 28 U.S.C. § 2244), once the state shows that a federal habeas corpus petitioner has filed his federal petition beyond the applicable one year statute, the petitioner bears the burden of showing statutory tolling, *Smith* v. *Duncan*, 297 F.3d 809, 814 (9th Cir 2002), abrogated on other grounds in *Moreno* v *Harrison*, 245 Fed. App'x 606, 608 (9th Cir. 2007), and equitable tolling, *Pace* v. *DiGuglielmo*, 544 U.S. 408, 415 (2005),

Miranda v *Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002); *Alexander* v. *Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002).

The propriety of placing the burden of showing inadequacy upon petitioners—and in also mandating that proof depend upon published rules and explained judicial decisions—is demonstrated by Martin's reliance on *Dennis* v. *Brown*, 361 F Supp.2d 1124 (N D. Cal. 2005). RBOM 35. In that case, the district court found inadequacy without requiring the petitioner to prove anything; all he had to do was merely allege that the state procedural ruling was inadequate.[2] *Id* , at 1130-32, 1134. The court reached this decision disrespecting California's timeliness bar without any concrete evidence, certainly none from explicated published decisions, that there was anything irregular or discriminatory about California's practice. Acknowledging that seemingly divergent unexplained decisions may indeed have represented consistent exercises of discretion rather than random applications of or exceptions to the timeliness rule, the court nonetheless relied on the conclusion that "we have no way of knowing whether that is the case" *Id.*, at 1134 In other words, the court merely presumed that California courts had acted arbitrarily or

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[2] Petitioner cited 200 cases, but, virtually all of these cases were denied by unexplained rulings Entirely too much speculation is necessary to glean anything about adequacy from these summary denials

discriminatory just as the Ninth Circuit did in this case RBOM 14; Pet. App. 1-3

III. California's Habeas Corpus Timeliness Rule Is Adequate To Support A Federal Bar Because It Provides Fair Notice And Serves Legitimate State Interests.

A. Measuring it against the adequacy standard he proffers, Martin asserts that California's timeliness rule is inadequate to bar federal review. In essence, Martin bemoans the fact that California's rule, rather than setting out a rigid and mechanical deadline, is flexible and admits of discretionary judgment RBOM 37-50 This Court's precedents, however, do not demand calendar deadlines in state procedural rules.

Despite Martin's view, California's rule provides sufficient notice because it informs prisoners of the simple steps to follow in order to properly file a claim. Rather than imposing a hard deadline, California has chosen to articulate its timeliness rule, as discussed in the opening brief (PBOM 33-41), in terms of reasonable conduct by the petitioner He must diligently develop his claims, present those claims as promptly as circumstances permit, and explain when the claims were discovered and any reasons for delay in presenting them. A prisoner who follows these steps will be in compliance with California's timeliness rule. In contrast to the views of Martin and the Ninth Circuit, a California habeas petitioner

can successfully follow California's timeliness rule without being provided a clear "deadline" to meet.

The adequacy of California's timeliness rule is illuminated by this Court's decision in *Johnson* v. *United States*, 544 U.S. 295 (2005). In *Johnson*, this Court announced a rule of "due diligence" in the context of federal habeas corpus that is virtually identical to California's timeliness standard. To be timely under 28 U S C. § 2255, this Court held, a federal prisoner whose sentence was based in part on an invalid prior state conviction must act with "due diligence in discovering" that the state conviction was invalid. *Id.*, at 308 This Court clarified that "diligence can be shown by prompt action on the part of the petitioner as soon as he is in a position to realize that he has an interest in challenging the prior conviction with its potential to enhance the later sentence." *Id.*, at 308 In announcing this rule, this Court acknowledged that "'due diligence' is an inexact measure of how much delay is too much. But the imprecision here is no greater than elsewhere in the law when diligence must be shown, and the statute's use of an imprecise standard is no justification for depriving the statutory language of any meaning independent of corresponding state law, as the dissent would have us do." *Id.*, at 309, n 7 If the rule announced in *Johnson* is sufficiently clear to provide notice to federal habeas petitioners, then California's timeliness rule, which requires a similar exercise of diligence and promptness, is also sufficiently clear

Relying on a series of cases involving the distant fields of restraint of trade and price fixing (ABFD 18-20), Amicus Federal Defender suggests that this Court somehow deems "reasonableness" standards to be unconstitutionally vague. Certainly, in the specific context of price fixing statutes, this Court has held that laws criminalizing the charging of "unreasonable" prices or earning "unreasonable" profits are unconstitutionally vague. However, in *Nash* v *United States*, 229 U.S. 373, 377 (1913), this Court observed that, outside of the restraint of trade laws, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death." Given the specific nature of restraint of trade law and this Court's observation that the law is "full of instances" in which reasonableness standards apply, this Court should endorse California's timeliness rule, especially in light of its similarity to the standard this Court adopted in a closely analogous setting in *Johnson* v. *United States*

B. Rather than consider California's timeliness rule as a whole and in the context in which it is applied, Martin instead attempts to manufacture a lack of clarity by dissecting the rule and arguing that specific parts of the rule are uncertain. Martin's attempt at creating uncertainty in California's rule is not successful

Martin first professes to be confused about the triggering date for measuring substantial delay under the state rule. RBOM 36-37, 43-44 But the California Supreme Court has made it abundantly clear. Delay in seeking habeas relief is measured from the time a petitioner knew, or reasonably should have known, of the information and legal basis offered in support of the claim. *In re Robbins*, 18 Cal 4th, at 780, 787, 959 P.2d, at 317, 323. This is a triggering date nearly identical to one from AEDPA's statute of limitations: "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S C. § 2244(d)(1)(D). Thus, as the district court observed below, "If this principle of requiring due diligence is clear enough for federal practice, [ ] it is clear enough for state practice as well." Pet App 12

Martin argues that inmates in California are unable to proceed diligently due to factors beyond their control. RBOM 47, n 31. Claims are substantially delayed when they are not advanced within a reasonable time, and circumstances beyond an inmate's control are exactly the sort of justifications that the California Supreme Court has recognized *In re Sanders*, 21 Cal.4th 697, 705, 981 P.2d 1038, 1043 (1999); *In re Robbins*, 18 Cal 4th, at 787-88, 959 P.2d, at 322. This discretion and flexibility only make the California rule more fair—not suspect.

Martin complains, similarly, that convicted prisoners are unable to balance the requirements of

investigating claims and timely presentation. RBOM 44-45 However, the California Supreme Court has explained that a petitioner may temporarily withhold presentation of completed claims until the investigation concludes rather than presenting claims in piecemeal fashion in successive petitions. *In re Gallego*, 18 Cal 4th, at 838, n 13, 959 P.2d, at 299, n 13; *In re Robbins*, 18 Cal.4th, at 805-06, n.28, 959 P2d, at 335, n 28. Martin argues that there are no standards to guide how long the investigation and presentation of claims is supposed to take RBOM 45. But all petitioners have to do is present as promptly as circumstances allow and explain and justify their process. California's flexible standard is perfectly suited to the reality that some types of claims take longer to develop than others.

Ultimately, Martin's arguments suggest a self serving misunderstanding of California's timeliness rule. In California, a finding of untimeliness has two components: substantial delay and inadequate justification. *In re Robbins*, 18 Cal.4th, at 780, 959 P.2d, at 318 Martin's erroneous analysis focuses upon the length of delay in various cases but ignores the justification element of the rule. RBOM 15, 34-35. Thus, in Martin's cited example of *In re Saunders*, 2 Cal 3d 1033, 1040, 472 P.2d 921, 925-26 (1970), the state supreme court found that the delay was sufficiently explained by petitioner's limited education, total lack of legal experience, and lack of access to pertinent records Similarly, in *In re*

Huddleston, 71 Cal.2d 1031, 1034, 458 P.2d 507, 508 (1969), the court concluded that the delay was not unreasonable under the "present circumstances." Also, in *In re Mitchell*, 68 Cal.2d 258, 263, 437 P.2d 289, 292 (1968), the court observed that petitioner's ignorance of the law provided sufficient justification for his delay. In *In re Spears*, 157 Cal.App.3d 1203, 1208, 204 Cal.Rptr. 333, 335 (Cal Ct App 1984), the court ruled that the delay was adequately explained by petitioner's lack of capacity to represent himself. And in *In re Jones*, 265 Cal.App.2d 376, 378, 71 Cal Rptr. 172, 174 (Cal.Ct.App. 1968), the court noted that the delay was sufficiently justified by ignorance of the law. As these cases show, varying lengths of delay were adequately justified so that the petitions were deemed timely. Accordingly, a petitioner who might feel uncertain whether his petition is substantially delayed should avail himself of the easy safeguard of taking advantage of his opportunity to explain the specific reasons behind any delay.

C. Aligning with the Ninth Circuit, Martin maintains that the timeliness rule is different for capital and noncapital litigants in California so that the guidelines articulated in *In re Clark*, 5 Cal 4th 750, 855 P2d 729; *In re Gallego*, 18 Cal 4th 825, 959 P.2d 290; *In re Robbins*, 18 Cal 4th 770, 959 P2d 311; and *In re Sanders*, 21 Cal 4th 697, 981 P2d 1038 (1999), did not apply to him and provide guidance for his conduct. RBOM 12, 15, 40, 43. But the California Supreme Court has clearly stated that California's

capital case policies did not create or modify the timeliness requirements applicable to all habeas corpus petitions, except to establish a presumption of timeliness specific to capital cases. *In re Clark*, 5 Cal 4th, at 783, 855 P.2d, at 751 The Ninth Circuit's and Martin's failure to accept the State's interpretation of its own laws in this respect, *King* v. *LaMarque*, 464 F.3d, at 966, is untenable. See *Mullaney* v. *Wilbur*, 421 U.S., at 691; *Estelle* v. *McGuire*, 502 U S , at 67 In addition, the California Supreme Court routinely cites *Clark* and *Robbins* (both capital cases) in the untimeliness dispositions of noncapital cases (Pet. App 17-18), just as it did in this case. Thus, there is no validity to any claim that California treats delay and justification differently for capital and noncapital litigants.

D. It is curious that Martin spends considerable time invoking this Court's decisions in *Evans* v. *Chavis*, 546 U S 189 (2006), and *Carey* v. *Saffold*, 536 U S 214 (2002), in support of his arguments against California's timeliness rule. RBOM 36, 40-42, 45, n.31, 57. In those cases, this Court observed that California's collateral review system, including its indeterminate timeliness standard, is not so different from those of other states to warrant treating it differently in the context of the statute of limitations and tolling provisions of 28 U.S.C § 2244(d), and that federal courts must respect and apply California's timeliness standard when determining statutory tolling *Evans* v *Chavis*, 546 U.S., at 192-93; *Carey* v *Saffold*, 536 U S , at 222.

More particularly, in *Saffold*, this Court examined California's collateral review system and noted that timeliness is determined under a "general 'reasonableness' standard." *Carey* v. *Saffold*, 536 U.S., at 222. This Court explained further that this did not justify treating California differently: "The upshot is that California's collateral review process functions very much like that of other States, but for the fact that its timeliness rule is indeterminate." *Id.* This Court never suggested that there was anything improper in California's choice to offer prisoners a flexible standard or that California did not have a right to do so.

In *Chavis*, similarly, this Court reiterated that the federal courts must respect California's choice in the context of the tolling provision of 28 U.S.C. § 2244(d)(2) "'The fact that California's timeliness standard is general rather than precise may make it more difficult for federal courts to determine just when a review application (i.e., a filing in a higher court) comes too late' [*Carey* v. *Saffold*, 536 U.S.,] at 223 []. Nonetheless, the federal courts must undertake that task." *Evans* v *Chavis*, 546 U.S., at 223.

Chavis and *Saffold* undermine Martin's argument and strongly suggest that this Court recognizes that California has every right to employ an equitable and flexible standard such as the federal system did prior to the AEDPA *Day* v. *McDonough*, 547 U.S. 198, 215 (2006); former Habeas Rule 9(a)

IV. This Case Is The Appropriate Vehicle To Address The Adequacy Standard.

Martin and amici argue that this case is not the appropriate vehicle to address the adequacy standard. RBOM 57-59; ACFD 3-10. But these arguments merely seek to reopen this Court's decision to grant certiorari. This case presents an appropriate opportunity to address the adequacy standard because it involves a flexible rule of broad application. Moreover, any suggestion that the timeliness default was not actually imposed by the California Supreme Court is incorrect.

A. California's timeliness rule is an appropriate state procedural rule to clarify this Court's adequacy jurisprudence because it "is a typical procedural default." *Beard* v *Kindler*, 130 S.Ct., at 619 (declining the invitation to "undertake '[a] new effort to state a standard for inadequacy'" because the rule at issue in that case was a unique procedural rule). In contrast to the rule at issue in *Kindler*, a timeliness rule for habeas petitions is a rule that exists in all or virtually all states.

Martin argues that California's flexible timeliness rule is too unique and outside of the mainstream of other state timeliness rules to be a good vehicle for addressing adequacy. RBOM 57-59. However, Martin raised this issue in his original brief in opposition to certiorari. Respondent's Brief in Opposition 2-3. Accordingly, when this Court granted certiorari, it "necessarily considered and rejected

that contention as a basis for denying review." *United States* v *Williams*, 504 U.S 36, 40 (1992). Martin has presented no basis for revisiting this already rejected argument.

Moreover, this Court's evaluation of the adequacy of California's flexible and indeterminate timeliness rule will provide necessary guidance to lower federal courts evaluating similar rules Indeed, many state timeliness rules, like the federal habeas statute of limitations, employ exceptions to default that are necessarily flexible and fact specific. In other words, beyond an initial deadline, many states, and the federal courts, employ equitable exceptions that permit timely filing at some indeterminate point beyond the initial deadline. See, e.g., *Holland* v. *Florida*, 130 S.Ct 2549, 2562 (2010) (adopting equitable tolling for circumstances involving "diligence" and "extraordinary circumstances") This Court's evaluation of California's equitable timeliness rule for adequacy will be relevant when federal courts are evaluating the adequacy of timeliness rules from other states that employ flexible exceptions outside of their deadlines.

Finally, amicus Federal Defenders argue incorrectly (ABFD 3-13) that the California ruling was unclear and could be interpreted as a finding that Martin's second state petition was merely repetitive of his first. But the California Supreme Court's ruling denying Martin's second petition cited to *In re Robbins*, 18 Cal 4th, at 780, 959 P.2d, at 317-18, with the point page applicable specifically

to untimeliness. Pet. App. 60. Further, a comparison of the claims from the two state petitions demonstrates that they were not repetitive. In the second state habeas petition, Martin argued for the first time that trial counsel was incompetent for failing to call an expert witness to testify at the suppression of evidence hearing Further, Martin's claim of ineffective appellate counsel contained no specific examples of incompetence in his first pleading, a deficiency he corrected in his second filing with new allegations of incompetence. Indeed, Martin's counsel filed the second state petition to exhaust claims that had not been exhausted by the first. JA 24, 69-70, 72-73; Dist Ct Doc. 45, Exhs. D, E, G, K.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

JAMES WALKER, Warden, et al.,
Petitioners,

vs

CHARLES W. MARTIN,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Under state law in California, a prisoner may be barred from collaterally attacking his conviction when the prisoner "substantially delayed" filing his habeas petition. In federal habeas corpus proceedings, is such a state law "inadequate" to support a procedural bar because (1) the federal court believes that the rule is vague, and (2) the state failed to prove that its courts "consistently" exercised their discretion when applying the rule in other cases?

2. Should the varying rubrics used to express when a state procedural default rule is adequate be replaced with a single standard of fair notice of the rule and reasonable opportunity to make the claim?

3. On habeas corpus, as distinguished from direct review, does the adequacy inquiry provide sufficient marginal benefit to justify its litigation cost, or should it be abandoned altogether, recognizing that the cause-and-prejudice exception covers the relevant policy considerations?

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IN THE

Supreme Court of the United States

JAMES WALKER, Warden, et al.,
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CHARLES W. MARTIN,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The Court of Appeals for the Ninth Circuit has adopted an extreme approach to determining the

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

"adequacy" of state rules for the purpose of the procedural default doctrine. Even though the California Supreme Court clarified and explained the state timeliness rule 17 years ago, the Ninth Circuit has declared it inadequate on the ground that the state has not proved it is applied with the degree of uniformity that the Ninth Circuit deems necessary. That degree would serve no valid purpose and would ultimately be detrimental to criminal defendants.

The delay and expense that come from needless litigation of the "adequacy" issue and from needless litigation of defaulted claims are contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On December 7, 1986, children playing along the banks of the Sacramento River discovered the body of Charles Stapleton. *People* v. *Martin*, No. C022364 (Cal. App. 1997), p. 2 (unpublished).[2] He had been stabbed eight times in the neck, back, and throat. *Ibid.* His skull was fractured. *Ibid.* In the same area, the children also found the wallet of Charles W. Martin. Respondent's Motion for Summary Dismissal in *Martin* v. *Hubbard*, No. Civ. S-99-0223 (ED Cal., Nov. 8, 2007), p. 10 ("MSD").[3]

Three days later, during a taped interview with police, Martin's girlfriend, Bonnie Permenter, made statements that incriminated Martin. *People* v. *Martin*, *supra*, at 2. Martin disappeared. *Id.*, at 3.

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2. Available at http://www.cjlf.org/files/MartinCalApp1997.pdf.

3. Available at http://www.cjlf.org/files/MartinMotionSumDiss.pdf.

Martin was arrested in Florida eight years later. *Ibid.* A jury convicted him of first-degree murder and robbery in 1995. *Id.*, at 1. He was sentenced to life without the possibility of parole. MSD 2.

Martin appealed to the California Court of Appeal raising only a state-law hearsay claim. *People* v. *Martin*, *supra*, at 1. That court affirmed. *Id.*, at 9. Martin filed a petition for discretionary review with the California Supreme Court, also raising the same claim. See Magistrate Judge's Findings and Recommendations (ED Cal., Feb. 1, 2001), p. 3 ("MJFR").[4] That court denied review. J. A. 8. The case was final on direct review for the purpose of federal habeas law on July 15, 1997.

Seven months later, Martin filed a habeas corpus petition in the California Superior Court. See MSD 3. This petition contained an ineffective assistance claim, along with claims regarding the jury pool and jury instructions. See *ibid.* When this petition was denied, Martin filed a similar petition in the Court of Appeal.[5] After denial of this petition, Martin filed a petition in the California Supreme Court, which was denied January 27, 1999. J. A. 9.

Martin then filed a habeas corpus petition in federal court. See MSD 4. In 2001, the Magistrate Judge found that the ineffective assistance allegations of the second amended petition were sufficiently different

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4. Available at http://www.cjlf.org/files/MartinFindings010201.pdf.

5. In California, there is no appeal from denial of a habeas petition, and review is accomplished with a successive petition to a higher court. See *Carey* v. *Saffold*, 536 U. S. 214, 221 (2002). This was once common practice throughout the United States, although it is now unusual. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Carey* v. *Saffold*, No. 01-301, pp. 11-12, http://www.cjlf.org/pdf/Saffold.pdf.

from those filed in state court to constitute a new and unexhausted claim, and that a sufficiency of the evidence claim was also unexhausted. See MJFR 3-6.[6] This holding was followed by an amended petition of exhausted claims only and an abeyance order to allow petitioner to return to state court to exhaust, entered on July 9, 2001. See App. to Pet. for Cert. 33-34.

On March 18, 2002, nearly *five years* after the case was final on direct review, Martin filed a new state habeas petition in the California Supreme Court. This petition raised, for the first time in state court, the allegations that are the subject of the present petition. On September 11, 2002, the court denied this petition with citations to its precedents on untimeliness of habeas petitions, *In re Clark*, 5 Cal. 4th 750 (1993) and *In re Robbins*, 18 Cal. 4th 770, 780 (1998). App. to Pet. for Cert. 60.

Upon return to federal court, these claims were dismissed as procedurally defaulted. The Magistrate Judge found that the state procedural default rule was adequate, and the petitioner did not claim that the cause-and-prejudice or actual-innocence exceptions applied. See App. to Pet. for Cert. 54-57. The District Court adopted the Magistrate Judge's findings. On the question of procedural default, the District Court declined to "do as petitioner urges and interpret *Bennett* v. *Mueller* [322 F. 3d 573 (CA9 2003)] to require respondents to sort through thousands of noncapital habeas petitions to prove a negative where petitioner

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6. Whether different alleged shortcomings of counsel are separate claims or one claim is an unresolved question. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Bell* v. *Kelly*, No. 07-1223, pp. 13-23, http://www.cjlf.org/briefs/BellE.pdf. Because the holding that they were different claims was not disputed in the Court of Appeals, we will assume it to be correct for the purpose of this case.

has failed to point to any specific cases wherein the rule was inconsistently applied." App. to Pet. for Cert. 27.

The Court of Appeals for the Ninth Circuit reversed based on another case decided the same day, *King* v. *LaMarque*, 464 F. 3d 963 (CA9 2006). App. to Pet. for Cert. 21. "On remand, in order to be able to maintain its affirmative defense of procedural default, the government must show that cases after *In re Clark*, 855 P. 2d 729 (Cal. 1993), had sufficiently clarified the rule and that it had been consistently applied." *Ibid.*

On remand, the Magistrate Judge found that the state had indeed met its burden, App. to Pet. for Cert. 6-19, and the District Court adopted the findings and dismissed the action. App. to Pet. for Cert. 4-5. The Court of Appeals reversed again, based on its recent decision in *Townsend* v. *Knowles*, 562 F. 3d 1200, 1207 (CA9 2009). App. to Pet. for Cert. 1-3. Because California has chosen to use a general standard of "substantial delay" rather than a rigid cutoff, and because that standard has not been "firmly defined" (*i.e.*, made rigid) through case law, the state rule is deemed "inadequate." See App. to Pet. for Cert. 3.

This Court granted certiorari on June 21, 2010.

SUMMARY OF ARGUMENT

The rule that a state procedural rule must be "firmly established and regularly followed" has been routinely misused in the Ninth Circuit. Rules that are no less established and no less regularly followed than the corresponding federal court rules are routinely declared inadequate.

This Court's precedents on what is an adequate state ground present a confused jumble of varying rubrics. The common theme underlying all the cases,

on their facts if not in their language, is that a state rule must give the defendant fair notice of how to make his claim and a reasonable opportunity to make it. That should be the standard.

The habeas petitioner in this case had more than fair notice. Although California's flexibly defined timeliness standard may be uncertain in some cases, there is no doubt five years after finality on direct review is untimely. No federal policy warrants disregard of the state rule in this case.

While an adequate state ground is jurisdictional on direct review of state judgments in this Court, it is not on habeas corpus. This difference has permitted development of the "cause and prejudice" and "actual innocence" exceptions to the procedural default rule. These exceptions fully accommodate the federal policies served by the adequacy inquiry. There is no need for a separate adequacy inquiry on habeas corpus.

ARGUMENT

I. The "regularly followed" requirement has been routinely misused in the Ninth Circuit to sweep aside fair, necessary, and well-established state procedural rules.

In Part II, *infra*, we describe how the "inadequate state ground" doctrine is a confused, haphazard collection of ranging rubrics. This confused state of the law might not matter so much if it only applied to this Court's direct review of state court judgments, because we could be confident that the doctrine would be applied fairly and sensibly in practice, however lacking it may be in precision.

Regrettably, that is not the case. The doctrine applies equally to habeas review of state court criminal

judgments in the lower federal courts. See *Lee* v. *Kemna*, 534 U. S. 362, 375 (2002). In the hands of a panel that is hostile to a state's law, such as capital punishment or "three strikes," and looking for a way to reach defaulted claims, the "firmly established and regularly followed" rubric is a dangerous weapon for effectively nullifying perfectly valid state rules. That is precisely what has happened in the Ninth Circuit.

The present case involves the timeliness rule, but the Ninth Circuit has demonstrated hostility to other rules as well. Standard practice throughout the United States requires that claims based on the trial record be made on direct appeal. With some exceptions, such claims are defaulted if they are raised for the first time on collateral review, and they will generally be rejected on that basis. See *Sanchez-Llamas* v. *Oregon*, 548 U. S. 331, 350-351 (2006). California follows this rule. It was plainly stated in a decision of the state's highest court over half a century ago, see *In re Dixon*, 41 Cal. 2d 756, 759, 264 P. 2d 513, 514 (1953), and the rule was already well established by that time. See *In re Connor*, 16 Cal. 2d 701, 705, 108 P. 2d 10, 13 (1940).

Rigid application of procedural rules can produce unjust results, and so most rules have exceptions. It is common for these exceptions to evolve and be clarified over time. For example, the "cause and prejudice" test for federal collateral review was not fully formed until the comparatively late date of 1982, see *United States* v. *Frady*, 456 U. S. 152, 167-168, and the categorical exception of ineffective assistance claims from the raise-on-appeal rule was not settled until seven years ago. See *Massaro* v. *United States*, 538 U. S. 500, 504 (2003). A state's rule ought not be declared inadequate merely because it evolves over time through the process of case law. See *Beard* v. *Kindler*, 558 U. S. __, 130 S. Ct. 612,

620, 175 L. Ed. 2d 417, 426-427 (2009) (Kennedy, J., concurring).

In California, the *Dixon* rule contained an exception for "special circumstances constituting an excuse for failure" to raise the issue on direct appeal, 41 Cal. 2d, at 759, 264 P. 2d, at 514-515, with the boundaries of that exception left for further development. Lack of precision in the circumstances for excuse of a default does not constitute a "springe" that is unfair to the party making the claim, cf. *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923), so long as the rule itself is clear and feasible. If the law of the state clearly tells the parties, "Make claim A via procedure X or else you *may* not be allowed to make it later," there is nothing inherently unfair about relief from default being handled on a discretionary, case-by-case basis.

This is all just common sense, but the Ninth Circuit is oblivious to it. Instead, the "regularly followed" requirement for "adequacy" of a state ground is applied with "pointless severity," cf. *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964), in a manner that "would further no perceivable [federal] interest." Cf. *Osborne* v. *Ohio*, 495 U. S. 103, 124 (1990).

In 1979, Stevie Lamar Fields perpetrated a "one-man crime wave," committing numerous acts of rape, robbery, forcible oral copulation, assault with a deadly weapon, kidnapping, and murder against five victims. See *People* v. *Fields*, 35 Cal. 3d 329, 336, 673 P. 2d 680, 683 (1983). The State of California provided him with a direct appeal for his claims on the trial record and a habeas proceeding for claims requiring additional facts. See *In re Fields*, 51 Cal. 3d 1063, 800 P. 2d 862 (1990). When he came back for a third bite at the apple, the state high court invoked the long-established *Dixon* rule. See *Fields* v. *Calderon*, 125 F. 3d 757, 760 (CA9 1997).

"Normally, . . . such rules constitute an adequate and independent state-law ground preventing [a federal court] from reviewing the federal claim." *Sanchez-Llamas*, 548 U. S., at 351. Not in the Ninth Circuit. Even though the rule was clear, its applicability was clear, and compliance was readily available, the Ninth Circuit branded the rule "inadequate" because the California Supreme Court subsequently felt the need to clarify and crystalize the exceptions to the rule and the circumstances under which relief from default would be granted. See *Fields*, 125 F. 3d, at 762-763.

Instead of being narrowed to the claims properly presented to the state courts, the case was sent back to the district court for consideration of the defaulted claims as well, see *id.*, at 765, and another decade of litigation followed. A case that should have been over in 1997 only became final two years ago. See *Fields* v. *Ayers*, 552 U. S. 1314 (2008) (denial of certiorari).

Nevada has a one-year statute of limitations for habeas petitions. Nev. Rev. Stat. 34.726(1). The statute is straightforward enough on its face, but in *Collier* v. *Bayer*, 408 F. 3d 1279 (CA9 2005), the question arose whether an amendment to the judgment making no change to the sentence, but only correcting a statutory reference, restarted the clock. See *id.*, at 1282. The state courts ruled it did not, and the Ninth Circuit held this rule "inadequate" as not "well established" because that issue had not been fully resolved until after Collier's default. See *id.*, at 1285-1286, and n. 5; cf. *id.*, at 1289 (Bea, J., dissenting).

The corresponding federal statute has required more than a few cases to work out its kinks. See, *e.g.*, *Duncan* v. *Walker*, 533 U. S. 167 (2001); *Pace* v. *DiGuglielmo*, 544 U. S. 408 (2005); *Day* v. *McDonough*, 547 U. S. 198 (2006); *Holland* v. *Florida*, 560 U. S. __ (No. 09-5327, June 14, 2010). Yet the Ninth Circuit branded

the Nevada statute "inadequate" because of a similar process of refining the rule through decisional law. Cf. *Kindler*, 130 S. Ct., at 620, 175 L. Ed. 2d, at 426 (Kennedy, J., concurring).

The Ninth Circuit's pointless insistence on mechanical predictability and regularity of application, detached from the purpose of the adequacy rule, squanders scarce resources on needless collateral litigation. In *Bennett* v. *Mueller*, 322 F. 3d 573, 585-586 (CA9 2003), the Ninth Circuit remanded a case to the district court for a new round of litigation to determine if the state courts "regularly" enforce their rule, even though there had been no showing that the defendant had insufficient notice or opportunity to comply or that state rules had been applied in a discriminatory manner. Such remands are routine. See, *e.g.*, *McKinney* v. *Kane*, No. 05-56830, 2008 U. S. App. Lexis 10952 (CA9, May 16, 2008) (unpublished) (requiring further litigation of claim of instructional error raised for the first time on the *fourth* state habeas petition). Although the Ninth Circuit has created this morass of pointless litigation, this Court's confused jurisprudence on adequate state grounds has made it possible. The present case provides an opportunity to bring clarity to this area.

II. "Notice and opportunity" should be adopted as the test of adequate state procedural grounds, and the prior patchwork of confusing phrases discarded.

A. "An Untidy Area."

Justice Frankfurter once referred to habeas corpus as "an untidy area of our law that calls for much more systematic consideration than it has thus far received." *Sunal* v. *Large*, 332 U. S. 174, 184 (1947) (dissenting

opinion). The same could be said today of the "adequate and independent state grounds" doctrine.

The problem of adequate and independent state grounds is common to state-prisoner habeas cases under 28 U. S. C. § 2254 and this Court's direct review of state judgments under 28 U. S. C. § 1257. See *Lee* v. *Kemna*, 534 U. S. 362, 375 (2002). Most of this Court's precedents on the subject are in the latter category. These precedents span the entire twentieth century, and they form a haphazard patchwork, offering "Varying Rubrics" for defining inadequacy. See R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 557 (5th ed. 2003) (cited below as "Hart & Wechsler"). The phrases offered up include "without any fair or substantial support," *Ward* v. *Board of Commr's of Love Cty.*, 253 U. S. 17, 22 (1920), "arid ritual of meaningless form," *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958), the defendant "could not fairly be deemed to have been apprised of [the rule's] existence," *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457 (1958), a rule not previously applied "with the pointless severity" of the present case, *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964), "impos[ing] unnecessary burdens upon [federal] rights," *Brown* v. *Western R. Co. of Ala.*, 338 U. S. 294, 298 (1949), "more properly deemed discretionary than jurisdictional," *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 234 (1969), "not strictly or regularly followed," *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964), and finally, whether "the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by [the state] court." *Central Union Tel. Co.* v. *Edwardsville*, 269 U. S. 190, 194-195 (1925); *Parker* v. *Illinois*, 333 U. S. 571, 574-575 (1948) (quoting and following *Central Union*).

One scholar surveying the varying formulations declared that "the governing rules may be discerned less in what the Court has been saying than in what it has been doing." Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 944 (1965). More than once, the Court has used broad language to declare a state ground inadequate and then refused to review a claim in a later case that would seem to come within that language, never explaining the apparent inconsistency.

Davis v. *Wechsler*, 263 U. S. 22, 23 (1923), involved a jurisdictional objection based on an executive order implementing a federal statute. The objection was rejected by the state court on the ground that the objecting party had waived it by entering a general appearance, even though the pleading making the appearance clearly stated the objection. *Id.*, at 24. Justice Holmes, in often-quoted language, rejected the contention that this ground blocked Supreme Court review. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Ibid.*

This statement seems to imply a sweeping authority to disregard state procedural defaults, so long as the objection is "plainly and reasonably made." The appellant in *Central Union*, *supra*, thought so. It had forfeited its constitutional claims, under well-established Illinois rules, by taking its appeal to the intermediate appellate court rather than the Illinois Supreme Court. 269 U. S., at 193-194. There was nothing unplain or unreasonable about its statement of its claims. Yet the Court held that the state procedural default ground was adequate, stating the "reasonable opportunity" standard quoted *supra*, at 11. The two cases were decided only two years apart. Both were

unanimous. Eight Justices participated in both cases, including the authors of both opinions. Yet there is no explanation of why a claim that seems to come within the language of *Davis* was rejected in *Central Union*.

Henry v. *Mississippi*, 379 U. S. 443, 447 (1965), seemed to say that the test was whether the state rule served a "legitimate state interest."[7] In *Monger* v. *Florida*, 405 U. S. 958 (1972), the defendant's claim had been barred by one of the rare procedural rules that appears to lack a legitimate interest. This Court denied certiorari but took the unusual step of specifying the reason—"an adequate state ground." *Id.*, at 958. Monger had filed his notice of appeal too early, before formal entry of judgment, and he did not renew it afterward. *Id.*, at 958-959 (Douglas, J., dissenting). The dissent quoted *Henry* to no avail. *Id.*, at 961-962. See also Hart & Wechsler, *supra*, at 561, and n. 12 (citing *Monger* for the proposition that "for the most part Henry has been ignored in subsequent cases"); 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4028, pp. 396-397 (2d ed. 1996); E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Harnett, Supreme Court Practice § 3.26, p. 226 (9th ed. 2007) (comparing *Henry* with *Wainwright* v. *Sykes*, 433 U. S. 72 (1977)).

At times, the standard seems to appear out of nowhere. In *Henry*, *supra*, the Court declared that its

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7. We hedge with "seemed," because the *Henry* opinion is universally considered unclear. See Hart & Wechsler, *supra*, at 561 ("confusing"), 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4020, p. 288 (2d ed. 1996) ("surprisingly ambiguous"); Sandalow, Henry v. Mississippi and the Inadequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 196, n. 39 ("puzzling"); Hill, *supra*, 65 Colum. L. Rev., at 984, n. 173 ("confusing"), *id.*, at 986, n. 174 ("unclear").

"legitimate state interest" standard was based on settled law, 379 U. S., at 447, but this assertion was simply false. See Hill, 65 Colum. L. Rev., at 988; Wright, Miller, & Cooper, *supra*, § 4020, at 289 (cases cited do not support this statement); Glennon, The Jurisdictional Legacy of the Civil Rights Movement, 61 Tenn. L. Rev. 869, 899 (1994) ("remarkable remake of the . . . doctrine"). Similarly, *Barr* v. *City of Columbia*, 378 U. S., at 149, claimed that its "strictly or regularly followed" standard reflected established precedent. This is an overstatement, to put it mildly, see Hill, *supra*, at 962, n. 71, unsupported by the earlier cases. *Barr* cites four cases for this proposition, yet the word "strictly," which has been the source of much mischief since *Barr*, does not appear in the statement of the rule in any of the four. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S., at 457-458, sets forth the novelty/fair notice standard. *Wright* v. *Georgia*, 373 U. S. 284, 291 (1963), and *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 301 (1964), quote *Patterson*. *Shuttlesworth* v. *Birmingham*, 376 U. S. 339 (1964) (*per curiam*), is a summary reversal citing *Williams* v. *Georgia*, 349 U. S. 375 (1955), but not otherwise stating a test. *Williams* was a case of discriminatory use of a discretionary power, such that "the state court action in the particular circumstances is, in effect, an avoidance of the federal right." *Id.*, at 383 (footnote omitted). The "strictly" requirement in *Barr* was a bolt from the blue, and one that can cause perverse results if taken literally.

In *Walker* v. *Birmingham*, 388 U. S. 307, 319 (1967), the Court described *Barr* as a case "where a state court has followed a regular past practice of entertaining claims in a given procedural mode, and without notice has abandoned that practice to the detriment of a litigant who finds his claim foreclosed by a novel procedural bar." If *Barr* itself had used these words,

instead of its unprecedented and unnecessary "strictly" language, much confusion could have been avoided.

Some cases in the series reach eminently sensible results on their facts, entirely consistent with precedent, yet inexplicably assert indefensible and unprecedented rationales for them. *Sullivan*, *supra*, is the worst of this lot. The state ground was indeed inadequate because, as Justice Harlan explained in dissent, the appellant had no reason to believe that the procedure he followed was not in compliance. See 396 U. S., at 245-247 (applying the *Patterson* novelty standard). Instead of applying this well-established standard, the *Sullivan* majority made the breathtaking assertion that all rules involving the exercise of discretion are inadequate. See *id.*, at 234. Although *Williams* v. *Georgia*, 349 U. S., at 389, also was based on the discretionary nature of the rule, it was the discriminatory use of that discretion, rather than the mere existence of discretion, that enabled federal review. See *id.*, at 383.

A single, coherent standard is long overdue. The standard should accommodate the need to respect state procedures while recognizing the responsibility of the states to provide meaningful remedies for federal claims, and opening the door to federal relief when they do not. Respect for *stare decisis* also requires a standard consistent with the results in most of the precedents. That standard, *amicus* submits, can be formed by combining *Patterson*'s "fairly . . . apprised" with *Central Union*'s "reasonable opportunity." That is, the claimant should have fair notice that the rule exists and applies to the circumstances, and he should have a reasonable opportunity to present his federal claim.

See Wright, Miller, & Cooper, *supra*, § 4027, at 386-387, 392. Nothing more is required.[8]

B. Policy Reasons.

There are solid policy reasons for federal courts to respect the procedural rules of state courts. See *Coleman* v. *Thompson*, 501 U. S. 722, 745-747 (1991). In our federal system, state courts must necessarily adjudicate federal questions, because it would be impractical to remove every case with a federal issue to federal court. Practical considerations also preclude having two different sets of procedural rules: one for state issues and another for federal. See Wright, Miller, & Cooper, *supra*, § 4021, at 302. A single objection will often have both state and federal grounds, such as the hearsay rule and the Confrontation Clause or the Takings Clause of the Fifth Amendment and a parallel provision of the state Constitution. Having two different sets of rules for the time to raise a single objection would be chaotic.

On habeas corpus, there is an additional reason for recognizing and giving effect to state procedural default rules. The requirement that the petitioner first exhaust state remedies is a time-honored federal policy. See 28 U. S. C. § 2254(b), (c); *Ex parte Royall*, 117 U. S. 241, 253 (1886). Respect for state procedural default rules is necessary to " 'protect the integrity' of the federal exhaustion rule." *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999) (quoting *id.*, at 853 (Stevens, J., dissenting)).

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8. In a criminal case, if trial counsel fails to use the reasonable opportunity, that may form the basis of an ineffective assistance claim, either as an independent claim or as "cause" for the default. That claim, in turn, must be presented to the state courts at the proper time, if one is provided. See *Edwards* v. *Carpenter*, 529 U. S. 446, 452 (2000). In a civil case, a malpractice suit would be the remedy.

Without the default rule, "a prisoner could evade the exhaustion requirement—and thereby undercut the values that it serves—by 'letting the time run' on state remedies." *Id.*, at 848 (opinion of the Court quoting the dissent on this point).

Balanced against these considerations are "the federal interests in protecting federal rights against bad procedure." Wright, Miller, & Cooper, *supra*, § 4021, at 302. Underlying many of the old cases is a strong, if unstated, suspicion of state-court hostility to the underlying federal law. It is no coincidence that the most sweeping statements come in cases of black defendants and the NAACP from the South at the height of the civil rights struggle. See Sandalow, Henry v. Mississippi and the Inadequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 190; see also Glennon, 61 Tenn. L. Rev., at 885-902 (describing how state grounds doctrine shifted during the civil rights struggle and has since shifted back). Fortunately, this era is behind us and has been for some time. See *Stone* v. *Powell*, 428 U. S. 465, 493-494, n. 35 (1976). This is not to say the Court was wrong to do what it did in the 1960s. Great struggles may require drastic measures, but when the crisis is over we should return to the normal modes of procedure. See *Ex parte Milligan*, 4 Wall. (71 U. S.) 2, 109 (1866).

Conscious hostility is not the only danger to federal rights, however. Sometimes a generally fair rule can operate in an unfair manner in a particular case, cutting a party off without a realistic opportunity to make its case. See *Michel* v. *Louisiana*, 350 U. S. 91, 95 (1955). For example, *Hathorn* v. *Lovorn*, 457 U. S. 255, 262-263 (1982), involved a rule against raising new issues in a petition for rehearing. This is generally a fair and unobjectionable rule. In the particular case, though, the state court had salvaged a facially unconsti-

tutional statute through drastic and unexpected surgery, see *id.*, at 258-259, thereby raising a different federal question from the one originally presented. As a practical matter, the petition for rehearing was the first opportunity to raise this claim. Federal rights need protection from an unreasonable refusal to make a needed exception to a normally fair rule.

Lee v. *Kemna*, 534 U. S., at 382-383, is arguably a case of this type. Although a requirement that a motion for continuance be in writing and supported by affidavit is normally fair, it would have been impractical and pointless in the unusual circumstances of the case. *Lee* could also be read more broadly, "to adopt a sweeping general view that 'close enough is good enough,' rejecting the adequacy of state procedural grounds merely because no important procedural interest seems at risk in the specific circumstances." See Wright, Miller, & Cooper, *supra*, § 4028, at 46 (2010 Supp.) Such a reading would make *Lee* a radical departure from precedent, though, see *ibid.*, and it would validate the dissent's charge that the majority was reviving the discredited approach of *Henry* v. *Mississippi*, 379 U. S. 443 (1965). See Hart & Wechsler, *supra*, at 562-563. The *Lee* Court denies that it does either of these, see 534 U. S., at 386, so a broad reading of *Lee* is not correct. See *Johnson* v. *Texas*, 509 U. S. 350, 365-366 (1993) (an opinion cannot be read so broadly as to overrule earlier precedents, when the opinion itself expressly holds it does not create a new rule).

Another situation which still arises on occasion is the inherently fair rule that is unfairly applied retroactively. A state may legitimately specify *in advance* which of two possible remedies a claimant must pursue, but it cannot "bait and switch." See *Reich* v. *Collins*, 513 U. S. 106, 111 (1994). Similarly, there is a federal interest in protecting federal rights from unforeseeable

applications of existing rules. See *supra*, at 15 (discussing *Sullivan*). A competent lawyer should be able to discern the contours of the rule with sufficient clarity that he or she knows what to do to safely preserve the claim. See *Walker* v. *Birmingham*, 388 U. S., at 320 (petitioners "on notice" of the correct procedure and not "entrapped or misled"). That does not mean that the boundaries of the rule must be so crisp that the lawyer can confidently skate on the edge. There are good reasons for rules to be flexible, see Wright, Miller, & Cooper, *supra*, § 4026, at 385-386, and flexibility necessarily creates fuzzy boundaries. Fair notice means that a procedure that appears to be in *clear* compliance cannot suddenly be declared to be a default.

However, there is *no* federal interest in compelling or even encouraging the states to purge all discretion from the operation of their procedural default rules. This is the perverse incentive of opinions such as the majority in *Sullivan* v. *Little Hunting Park, Inc.*, *supra*. The "more properly deemed discretionary than jurisdictional" language of the *Sullivan* majority opinion was overruled *sub silento* in *Kindler*. "Nothing inherent in [a discretionary] rule renders it inadequate for purposes of the adequate state ground doctrine." 130 S. Ct., at 618, 175 L. Ed. 2d, at 424. This is an important first step in dismantling those aspects of the adequate state ground doctrine that serve no important federal interest.

If *Sullivan* is defunct, what becomes of *Barr*'s "strictly or regularly followed" requirement? How does a court decide if another court or system of courts "strictly" applies a discretionary rule? Failures to apply the rule and exercises of discretion within the rule may not be possible to distinguish.

Dugger v. *Adams*, 489 U. S. 401 (1989), illustrates that this Court does not apply the "strictly" require-

ment literally. The dissent argued that the Florida Supreme Court had reached the merits in two other cases despite the same default, and therefore, under *Barr*, the state rule was inadequate. *Id.*, at 416-418 (Blackmun, J., dissenting). The majority rejected this argument, noting that the rule was applied in "the vast majority of cases." *Id.*, at 411, n. 6. The Court noted that even though the failure to clearly state the procedural default in a few cases would permit federal habeas review in those particular cases, it would not "undercut the adequacy" of the rule in general. *Id.*, at 411-412, n. 6.

While *Adams* reached the correct result, it did not establish a workable rule for the guidance of other federal courts. Application in the "vast majority of cases" is sufficient, but whether it is necessary is not specified. Nor is there any quantification of how vast the majority needs to be.

The answer, *amicus* suggests, is not to be found in numbers. "The adequate state ground doctrine cannot be applied without consideration of the purposes it is designed to serve." *Kindler*, 130 S. Ct., at 619, 175 L. Ed. 2d, at 425-426 (Kennedy, J., concurring). The purpose is to insure that litigants are not cheated out of a fair opportunity to present their federal claims. Just as that purpose is not served by encouraging states to purge discretion from their rules, neither is it served by encouraging them to replace general standards with rigid cut-offs or to restrict their exceptions so as to keep their "regularly applied" numbers up.

No doubt in the mid-1960s there was a legitimate concern underlying the apparent distrust of discretionary or less-than-strict rules. That was the suspicion they were being used discriminatorily against federal rights, civil rights organizations, and black criminal defendants. See Glennon, 61 Tenn. L. Rev., at 895

(noting "state court efforts to use their procedural rules to impede the civil rights movement"). In 2010, that possibility may not have vanished entirely, but it is a faint shadow of what it was in 1964. Today, the cure is far worse than the disease. Flexibility and discretion in the application of default rules should be encouraged, not discouraged.

If the state courts really did exercise discretion or general standards so as to discriminate on the basis of race or against fundamental rights, that would be a violation of the Equal Protection Clause by itself. A requirement of truly strict application could only be justified as a kind of conclusive presumption to relieve the claimant of the difficult burden of proving discrimination. Such presumptions should only be used where they produce the correct result most of the time. See *Coleman* v. *Thompson*, 501 U. S., at 737. Presuming discrimination from a lack of iron rigidity in the application of default rules would reach the wrong result nearly all of the time.

In general, then, the requirements of fair notice and a reasonable opportunity to comply accommodate all the important policy considerations. Two supplemental rules should also be recognized to deal with unusual situations. A state rule should not be allowed to defeat the policy of a pertinent federal statute, and actual, invidious discrimination in the application of a state rule independently violates the Equal Protection Clause.

C. Consistency with Precedent.

As we noted earlier, respect for *stare decisis* requires that any restatement of the doctrine of adequate and independent state grounds be as consistent as possible with precedent. No coherent theory could possibly embrace the widely disparate language of the prece-

dents, but it is possible to reconcile all but one of the major cases on their facts. "It is black letter law that the holding of a case is determined by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them." *People* v. *Davis*, 7 Cal. 4th 797, 823, 872 P. 2d 591, 608 (1994) (Mosk, J., dissenting) (internal quotation marks omitted). Hence, consistency with the material facts is at least as important as consistency with the language.

First, we can put to one side those cases in which the state rule operates contrary to the policy of a federal statute or regulation. *Davis* v. *Wechsler*, 263 U. S. 22 (1923), belongs in this category. That case involved a suit against a railroad under federal control, and it was brought in violation of a federal executive order prescribing the venue of such suits. See *id.*, at 23; see also *Alabama & Vicksburg R. Co.* v. *Journey*, 257 U. S. 111, 112-114, and n. 1 (1921) (quoting and upholding the order). The purpose of the order was to divest the court of authority to hear the case at all, so the policy considerations supporting respect for state procedure, see *supra*, at 16, diminish to the vanishing point. It would defeat the policy of the order and the statute it implemented to allow a minor misstep in local procedure to subject a federally controlled entity to suit in a court where the case never should have been. Taking a limited view of *Davis*, such as this one, is necessary to reconcile it with *Central Union Tel. Co.* See *supra*, at 12-13.[9] *Brown* v. *Western R. Co. of Ala.*, 338 U. S. 294 (1949), can be considered in the same special class. "*Brown* did not involve a pleading prob-

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9. An alternative limited view of *Davis* is that the state court's procedural ruling was novel and surprising. See Hill, *supra*, 65 Colum. L. Rev., at 975-976. If Professor Hill is correct, the *Davis* holding on its facts is consistent with our proposed general standard.

lem at all but rather a misconception by the state court as to the governing substantive [federal statutory] law." Hill, *supra*, 65 Colum. L. Rev., at 973.

The federal statute cases aside, we turn to the facts of other cases. The easiest cases are those where the state rule, as applied, is so grossly unfair as to violate due process. *Reece* v. *Georgia*, 350 U. S. 85 (1955), is the exemplar of this group. The indigent defendant's time to challenge the composition of the grand jury expired before counsel was appointed. See *id.*, at 89-90. This is obviously not a reasonable opportunity to state his federal claim, however clearly established the rule might have been.

Cases involving new rules unfairly applied retroactively fit with our proposed requirement of fair notice. These include *Ford* v. *Georgia*, 498 U. S. 411, 424 (1991), *Johnson* v. *Mississippi*, 486 U. S. 578, 587-589 (1988) (state case law at the time of the "default" indicated that the procedure defendant used was proper), and *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457 (1958) ("petitioner could not fairly be deemed to have been apprised of [the rule's] existence"). *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 677-678 (1930), found that the retroactive application of a new rule defaulting the federal claim was a due process violation, so this case fits both categories.

Closely related are those cases where the state rule was clearly established before the "default," but the procedure followed by the federal claimant appeared to be in compliance with the rule as applied up to that time. These include the infamous *Rogers* v. *Alabama*, 192 U. S. 226, 229-230 (1904) (two-page motion stricken as "prolix"), *Sullivan* v. *Little Hunting Park*, discussed *supra*, at 15, and *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964). In *Barr*, the state court had held

that the objection was "too general to be considered." *Ibid.* Yet, this Court noted, in four other nearly contemporaneous cases, the state court had considered equally general objections and, significantly, had *granted* relief in two of those cases. See *ibid.* This is not mere inconsistent application; it is a rule so vague it fails to give fair notice. In *James* v. *Kentucky*, 466 U. S. 341, 346-348 (1984), the preexisting case law was too confused to give fair notice that defendant had to ask for an "instruction" rather than an "admonition" under the circumstances. In *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958), the Court noted "a long line" of decisions permitting motions like the defendant's.

Finally, there are the cases where the rule as applied denies a reasonable opportunity to present the federal claim, however well established it may be and however fair it may be in most cases. *Hathorn* v. *Lovorn*, 457 U. S. 255 (1982), illustrates this category. The petition for rehearing in that case was the first opportunity to present the federal question as a practical matter. See *supra*, at 17. Regardless of whether the state rule against raising new issues on petition for rehearing violated due process as applied, the plaintiffs did not have a fair opportunity to present their claim, and hence the state ground was not adequate to bar federal review. In *Ward* v. *Board of Commr's of Love Cty.*, 253 U. S. 17, 23 (1920), the "coercive means" used by local authorities to illegally tax exempt Indian land had left the Indians with no reasonable opportunity to make the prepayment challenge the state required. *Lee* v. *Kemna*, *supra*, also fits in this category. See *supra*, at 18.

The one case that cannot be reconciled on its facts is *Henry* v. *Mississippi*, 379 U. S. 443 (1965). That case involved a contemporaneous objection rule. *Id.*, at 445-446. The defendant did not object to certain evidence when it was introduced, although he did later. *Id.*, at

445. The actual holding of this confusing case was to remand to the state court with an invitation to adopt the "deliberate bypass" standard of *Fay* v. *Noia*, 372 U. S. 391 (1963), for its own procedural default rule. See *Henry*, *supra*, at 453.[10]

Henry's deficiencies were obvious at the time and were cataloged in Justice Harlan's dissent, *id.*, at 457-465, and Professor Hill's article, *supra*, 65 Colum. L. Rev., at 982-992. Today, there are additional reasons the Court should not be too concerned with *Henry* as precedent. The decision itself is routinely ignored. See *supra*, at 13; *Lee*, 534 U. S., at 394 (Kennedy, J., dissenting). The most recent mention of the case in this Court is *Kindler*'s quotation of Justice Harlan's dissent. See 130 S. Ct., at 618, 175 L. Ed. 2d, at 424. Most importantly, though, *Henry* is heavily dependent on *Fay* v. *Noia*, which has since been overruled. See Wright, Miller, & Cooper, *supra*, § 4020, at 282, 291. At this point, *Henry* has so little value as precedent that it should not prevent the formulation of a coherent standard.

In summary, a coherent standard of "adequate" state grounds is needed to replace the existing patchwork for state procedural default rules. An adequate state procedural rule is one that (1) gives fair notice that the rule exists and applies, and (2) provides a reasonable opportunity to present the claim. This standard embraces the important policy considerations and is consistent with all the major precedents, except for one case that should no longer be considered a valid precedent.

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10. The state court declined the invitation. This Court denied certiorari, superfluously adding that the denial was without prejudice to habeas relief, and Henry subsequently obtained habeas relief. See Glennon, 61 Tenn. L. Rev., at 898-899.

III. The habeas petitioner in this case had more than fair notice and opportunity.

As the Magistrate Judge in this case noted, "Since *In re Clark*, it cannot be seriously contended that California's timeliness rule for habeas petition is other than well established. In several cases, the state supreme court has gone to great lengths to emphasize the importance of this rule. [Citations.]" App. to Pet. for Cert. 54.

California's timeliness standard, as expressed in *Clark*, is that "a petition should be filed as promptly as the circumstances allow, and the petitioner 'must point to particular circumstances sufficient to justify any substantial delay . . . .' " *In re Clark*, 5 Cal. 4th 750, 765, n. 5, 855 P. 2d 729, 738, n. 5 (1993). The Ninth Circuit has noted disapprovingly that this limitation is less clear than the one-year cutoff of AEDPA. See *Townsend* v. *Knowles*, 562 F. 3d 1200, 1208 (2009). It is indeed, and it is also generally much more favorable to petitioners. Under the federal statute, there are a few alternative starting dates that rarely apply, see 28 U. S. C. § 2244(d)(1)(B)-(D), and equitable tolling for extraordinary circumstances. See *Holland* v. *Florida*, 560 U. S. __ (No. 09-5327, June 14, 2010) (slip op., at 19). Other than those uncommon situations, though, the federal rule is "one size fits all"—one year from finality on direct review. See also 28 U. S. C. § 2255(f)(1) (same for federal prisoners).

The California rule is similar to the pre-AEDPA federal rule. See *Lonchar* v. *Thomas*, 517 U. S. 314, 326 (1996) (quoting former Habeas Rule 9(a)). That rule permitted dismissal of delayed petitions without defining "delayed." California's rule has been declared "inadequate" because the State has chosen *not* to follow the lead of Congress and *not* enact a law like the one widely bemoaned as "draconian" by pro-petitioner

commentators. See, *e.g.*, Zheng, Actual Innocence as a Gateway Through the Statute of Limitations Bar on the Filing of Federal Habeas Corpus Petitions, 90 Cal. L. Rev. 2101, 2131 (2002). It is "particularly strange to disregard state procedural rules that are substantially similar to those to which we [gave] full force in our own courts," *Kindler*, 130 S. Ct., at 618, 175 L. Ed. 2d, at 425, for many years before AEDPA, and which are more favorable to petitioners than AEDPA.

No one could be surprised that a habeas petition filed five years after finality on direct review would be considered delayed. See, *e.g.*, *Lonchar*, 517 U. S., at 317-318 (five years not counting two for pendency of state petition); *id.*, at 326-327 (petition is delayed, only question is prejudice). There may be cases where a petitioner could claim lack of fair notice, but this is not one of them. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy*, 417 U. S. 733, 756 (1974). If that is true for statutes defining crimes, it surely should be sufficient to respect a rule of procedure.

The State of California provided Martin with a procedure to adjudicate his challenges to his conviction. It gave him fair warning that a multi-year delay could result in loss of his claims. He had a reasonable opportunity to comply with the rule. He does not claim to be able to meet the "cause and prejudice" or "actual innocence" exceptions. See App. to Pet. for Cert. 57 (Magistrate Judge). That is all that is needed to dispose of the claim. The Magistrate Judge got it right six years ago.

IV. Given the *Sykes* and *Carrier* exceptions to the procedural default rule, the entire "adequacy" inquiry is unnecessary on habeas and a source of unjustified expense and delay.

In our brief supporting the certiorari petition, at pages 13-15, *amicus* CJLF argued that the federal policies underlying the adequate state grounds doctrine are fully served by the "cause and prejudice" and "actual innocence" exceptions to the procedural default rule. If a petitioner shows that he defaulted his claim because he was tricked or trapped by a genuinely "inadequate" state rule, that is "cause." Hence, no separate analysis of adequacy is necessary on habeas, as distinguished from this Court's direct review of state-court judgments. We will not repeat the argument in full here but incorporate our argument from the certiorari stage.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

September, 2010

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-996

In the
Supreme Court of the United States

James Walker, Warden,
Petitioner,

v.

Charles W. Martin,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF OF FEDERAL COURTS SCHOLARS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

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Law school affiliations are included for identification purposes only. The views expressed in this brief are those of the individual *amici* and do not necessarily reflect the views of the institutions at which they teach or with which they are otherwise affiliated.

In this case, the Warden and the Criminal Justice Legal Foundation, appearing as *amicus curiae*

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[1]Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged by the parties with the Clerk of the Court pursuant to Rule 37.3.

in support of the petitioner, have asked this Court to overturn well established adequate and independent state ground jurisprudence in favor of a regime which would either concern itself only with "fair notice" or entirely dispense with the requirement of adequacy. These proposals for sweeping change implicate not only cases which arise in federal district court habeas proceedings but also cases which come before the Court on direct review. Given the central role that the adequate and independent state ground doctrine plays in matters of federal jurisdiction, *amici* have significant familiarity with and expertise in the issues presented in this case.

SUMMARY OF ARGUMENT

Modern case law expounding the adequate and independent state ground doctrine has roots that are nearly as old as the Republic itself. Certainly, for well over a century, this Court has examined the adequacy of state court grounds of decision to determine its own jurisdiction on appeal. And more than thirty years ago, the Court selected the same adequacy inquiry as the standard by which federal habeas courts should decide whether to abstain from exercising their statutory jurisdiction to consider claims brought by state prisoners. Since that time, the law of adequacy has developed and functioned smoothly and interchangeably in both the direct and collateral review contexts. Acceptance of the proposal of the Warden and his *amicus* to abandon (or nearly abandon) the adequacy inquiry would have far-reaching consequences by dictating either corresponding changes to this Court's

jurisdictional determinations in direct appeal cases, or the development of a new line of habeas-specific abstention jurisprudence. Neither consequence is desirable or necessary.

Contrary to the suggestion of the Warden and his *amicus*, the role of the adequacy requirement has never been merely to ensure "fair notice" of state courts' procedural requirements. Instead, its purpose has always been to check the integrity of state court rulings – on notice, clarity, consistency and other grounds – lest the legitimate exercise of federal jurisdiction be thwarted and the uniformity and supremacy of federal law be frustrated. That this has been the historic role of the adequacy requirement is demonstrated repeatedly throughout this Court's relevant decisions, many of which are either misinterpreted or ignored by the Warden and his *amicus*.

Finally, it has also been suggested that the adequacy requirement is an anachronistic relic of the civil rights era whose time has passed. This suggestion overlooks both this Court's application of adequacy doctrine in a wide assortment of non-civil rights cases stretching back more than a century, and Congress' decision not to modify procedural default doctrine – including the adequacy requirement – during its comprehensive 1996 overhaul of the habeas statutory scheme. The more accurate view is that adequacy doctrine has long been, and decidedly remains, an important and useful tool for determining whether federal jurisdiction can or should be exercised. Nothing in the arguments of the Warden or his *amicus* would justify the kind of radical departure from settled law that they have proposed in this case.

ARGUMENT

A panel of the United States Court of Appeals for the Ninth Circuit held that because the California Supreme Court's timeliness bar was not consistently and regularly applied in state habeas corpus cases, it was not an adequate and independent state ground precluding merits review of respondent's claims in federal habeas corpus proceedings. *Martin v. Walker*, 357 Fed. Appx. 793, 794 (2009). *Amici* take no position as to whether the panel correctly applied the adequacy requirement in this particular case. However, In arguments presented for the first time in this Court, the Warden and his *amicus curiae*, the Criminal Justice Legal Foundation (CJLF), propose to jettison the long settled adequate and independent state ground doctrine for the purpose of giving preclusive effect to a state court's determination that some of Mr. Martin's challenges to his convictions for non-capital murder and robbery were not timely filed. The fact that the requests for sweeping change to this Court's jurisprudence were not advanced below is, in and of itself, sufficient reason for this Court to refuse to consider them.[2]

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[2]In the lower court proceedings, the Warden did not argue, and the lower courts did not have the opportunity to address, whether the adequate and independent state ground doctrine should be modified. Nor did the Question Presented in the Warden's Petition for Writ of Certiorari seek the radical departure from the adequacy inquiry that the Warden and his *amicus* now propose. Under this Court's well-established jurisprudence, these failures preclude consideration of the suggestions to jettison the adequacy requirement now before the Court. *See, e.g., Illinois v.*

More importantly, the effects of these proposals, if adopted, would be felt far beyond Mr. Martin's case, other California cases, or even habeas corpus cases generally. For well over a century, the adequate and independent state ground doctrine has governed this Court's direct appellate jurisdiction, ensuring that this Court appropriately reviews federal questions. Since its importation more than thirty years ago as the mechanism for implementation of a non-jurisdictional abstention policy in habeas corpus cases arising under 28 U.S.C. §§ 2241 and 2254, the doctrine – including its rules for assessing adequacy – has been developed and applied seamlessly across both the direct appeal and habeas contexts.

To make the changes now proposed by the Warden and his *amicus*, this Court would be required either to distort a long line of adequacy jurisprudence affecting both habeas abstention and direct appeal jurisdiction, or to separate the adequacy inquiry in habeas from the heretofore identical inquiry on direct appeal. Neither course would be wise. The former would affect this Court's appellate jurisdiction in ways that cannot fully be anticipated, and the latter would invite years, perhaps decades, of litigation over the meaning of the new standard. The circumstances presented by this case do not justify the introduction of so much uncertainty into a settled, fully functional area of federal law. In short, the adequate and independent state ground doctrine is not broken, and it does not need to be fixed.

Gates, 462 U.S. 213, 220-21 (1983).

I. The Court's jurisprudence defining the adequacy inquiry for state rulings is well established, clearly defined, and applicable to civil and criminal cases that come before the court in a wide range of procedural postures.

A. The adequate and independent state ground doctrine has been developed and applied seamlessly between habeas corpus and other categories of cases.

The adequate and independent state ground doctrine has its roots in decisions construing jurisdictional statutes enacted in the earliest days of the Republic. *See Martin v. Hunter's Lessee*, 14 U.S. 304, 354-60 (1816). For example, in *Tyler v. Magwire*, 84 U.S. 253 (1872), the state court rejected the mandate of this Court's resolution of a property dispute involving federal titles because of state law purporting to prohibit such suits in the court of equity in which it was raised. *Id.* at 284. In this context, the Court ruled that

> Presented as the proposition was as a reason for not executing the mandate of this court, the question as to its sufficiency is one which must necessarily be determined by this court, else the jurisdiction of the court will always be dependent upon the decision of the State court, which cannot be admitted in any

case.

Id. at 284; *see also Murdock v. Memphis*, 87 U.S. 590, 636 (1874) (noting the issue is "whether there is any other matter or issue adjudged by the State court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question"). The effectiveness of this simple doctrine – to inquire into the "sufficiency" of state rulings that would preclude the Court's jurisdiction – is apparent in its long, virtually unchanged application from the time of *Tyler* and *Murdock*.[3]

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[3]*See, e.g., Memphis Natural Gas v. Beeler*, 315 U.S. 649, 654 (1942) (reviewing the effect of a state contract to determine whether it "rests upon a fair and substantial basis"); *Broad River Power v. South Carolina ex rel. Daniel*, 281 U.S. 537, 543 (1930) (holding that state court ruling on the operation of electric street railway did not so depart "from established principles as to be without substantial basis"); *Ward v. Bd. of Cty. Comm'rs*, 253 U.S. 17, 22 (1920) (explaining that "it is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support"); *Enterprise Irrigation Dist. v. Farmers Mut. Canal*, 243 U.S. 157, 164 (1917) (finding state ruling on estoppel was not "arbitrary, or a mere device to prevent a review of the decision upon the Federal question"); *Creswill v. Grand Lodge*, 225 U.S. 246, 261 (1912) (finding "no evidence" to support state resolution of incorporation and infringement suit against fraternal order that rejected valid laches defense); *Leathe v. Thomas*, 207 U.S. 93, 99 (1907) (determining whether state ruling contract on dispute was "palpably unfounded"); *Pierce v. Somerset Ry.*, 171 U.S. 641, 648 (1898) (determining in a suit between railroad and its stockholders whether a defense of estoppel is

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Court observed that in federal habeas corpus review the adequate and independent state ground doctrine had functioned to bar federal review when an adequate foundation of state *substantive* law was dispositive, but that treatment of state procedural default had not consistently been guided by the same principle. *Id.* at 81. Reflecting on a recent decision in which it identified the "same clear interests" in the context of its habeas corpus review and direct review of criminal cases, *Francis v. Henderson*, 425 U.S. 536, 543 (1976), the Court eliminated this discrepancy and incorporated the adequacy doctrine to guide federal courts in determining when to abstain from exercising their habeas corpus jurisdiction in cases involving state procedural defaults. *Wainwright v. Sykes*, 433 U.S. at 87. With *Sykes*, the Court thus unified its treatment of substantive and procedural state bars across civil, criminal, and habeas corpus proceedings. The application of a single, simple rule of adequacy has continued to function effectively and operate seamlessly across all such cases. *See, e.g., Howlett v. Rose*, 496 U.S. 356, 366 (1990) (holding state ruling inadequate to bar review of civil rights violations based on search of a student's car on school premises); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (holding state court ruling in a habeas proceeding was inadequate to bar review of claims that sentence was based on an invalid prior conviction); *James v. Kentucky*, 466 U.S. 341, 348 (1984) (holding state ruling on criminal appeal

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"sufficient upon which to base and sustain the judgment of the state court").

was inadequate to bar review of claim that defendant's right to remain silent was violated by failure to instruct jury that adverse inference could not be drawn from his decision not to testify).

B. Accepting a proposal to eliminate an inquiry into adequacy would either distort over a hundred years of jurisprudence or unnecessarily divorce the habeas and direct review inquiries.

Were the Court to accept the invitation of the Warden and his *amicus* to abandon an inquiry into the adequacy of state rulings, one of two scenarios could be expected. If the Court forgoes its existing inquiry into the adequacy of state rulings in all categories of cases that come within its jurisdiction – either entirely or in favor of the limited attention to "fair notice" that the Warden suggests – the impact of such a dramatic departure from well-established jurisprudence that has simply and effectively governed federal review would be substantial. Such a change would affect this Court's appellate jurisdiction in ways that cannot fully be anticipated. The settled state of the law, and uncertainty following changes that are not necessitated by "bad law," counsel against revision. *Rogers v. Tennessee*, 532 U.S. 451, 472, 477 (2001) (Scalia, J., dissenting) (internal quotation omitted) (changes in law that represent exceptions to *stare decisis* must serve to correct "'manifestly absurd or unjust'" law and not the perception that need for a law has diminished over

time). One thing *is* predictable, however: eliminating the adequacy inquiry, or replacing it with "fair notice," would undermine the Court's constitutional and statutory obligations in its review of federal questions. *See* Section II, *infra*.

If the Court instead divorces the rule of adequacy in habeas corpus from that on direct review, additional concerns would arise. Such a development would invite extended litigation over the meaning of the new standard. This change also would stand in sharp contrast to the Court's prior approach to its jurisdiction in the two contexts. Although the adequacy "doctrine originated in cases on direct review, where the existence of an independent and adequate state ground deprives this Court of jurisdiction ... [it] applies with equal force, albeit for somewhat different reasons, when federal courts review the claims of state prisoners in habeas corpus proceedings." *Lee v. Kemna*, 534 U.S. 362, 388 (2002) (Kennedy, J., dissenting). This is true because the statutory scheme set forth in 28 U.S.C. § 2254 does not alter the *purpose* of federal review or its constitutional underpinnings. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 375 (2000) ("Over the years, the federal habeas corpus statute has been repeatedly amended, but the scope of that jurisdictional grant remains the same."). The same purpose in both direct and habeas corpus review warrants the same requirements for adequacy in both contexts, for "[f]aced with a common problem," the Court adopts "common solution[s]" to guide direct and habeas review. *Coleman v. Thompson*, 501 U.S. 722, 734 (1991) (aligning treatment of ambiguous state decisions in direct and habeas review).

II. The contention by the Warden and his *amicus* that adequacy is primarily concerned with "fair notice" is historically and descriptively inaccurate.

The Warden states that "[i]n most cases where this Court has found state rules inadequate, a lack of fair notice was explicitly or implicitly the basis for the decision." (Petr.'s Br. at 9.)[4] This position not only represents a serious misreading of the Court's precedent, but also reflects a fundamental misunderstanding of the role of the adequate and independent state ground doctrine in the Court's constitutional and statutory duty to ensure the supremacy of federal law. Throughout the history of the doctrine, the Court consistently has insisted that state procedural rules must be regularly applied among the

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[4]The Warden cites Justice Kennedy's dissent in *Lee v. Kemna*, *supra*, to conclude that "there are 'two essential components of the adequate state ground inquiry: First, the defendant must have notice of the rule; and second, the State must have a legitimate interest in its enforcement.'" (Petr.'s Br. at 18 (quoting *Lee v. Kemna*, 534 U.S. 362, 389 (2002) (Kennedy, J., dissenting).) Justice Kennedy also notes, however, that "[t]he Court will disregard state procedures not firmly established and regularly followed. In *James v. Kentucky*, 466 U.S. 341, 346 (1984), for example, the rule was 'not always clear or closely hewn to.'" 534 U.S. at 389; *see also Bronshtein v. Horn*, 404 F.3d 700, 708 (3rd Cir. 2005) (recognizing that "fair notice" is one part of a test for adequacy that also includes a "requirement of regular application"). As described in detail in section II.B, *infra*, whether a rule is firmly established and regularly followed is not limited to a question of notice.

same types of cases before barring federal review.[5] It is an inquiry that is critical to the Court's role in balancing state and federal interests in the exercise of its jurisdiction.

A. Inquiry into the adequacy of state rules is based in the Court's constitutional and statutory obligations.

This Court's constitutional authority to review "all cases," whether from state or federal tribunals, *Martin v. Hunter's Lessee*, 14 U.S. 304, 338 (1816), is guided by Congress in both the review of state judgments, 28 U.S.C. § 1257, and, in conjunction with the lower federal courts, in determinations of the lawfulness of an individual's custody pursuant to a state judgment, 28 U.S.C. §§ 2241 and 2254; *Coleman v. Thompson*, 501 U.S. at 730. This jurisdiction exists to

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[5]Although the Warden and his *amicus* make no effort to distinguish between substantive and procedural state rules when they claim that notice is the touchstone of the Court's jurisprudence in adequacy, there can be no serious argument that notice serves as the basis for the Court's treatment of substantive state rulings. The wealth of jurisprudence regarding the adequacy of substantive state rules plainly attends to the supremacy of federal law, a question unaffected by notice of the state's rules. *See, e.g., Howlett*, 496 U.S. at 366 (holding state ruling violated supremacy of federal law and thus was without "fair or substantial support"); *Radio Station WOW v. Johnson*, 326 U.S. 120, 131 (1945) (finding that state remedy in case of fraud between radio stations improperly impinged on federal licensing authority). We therefore will confine our discussion of the history of the doctrine to its application to procedural rules.

ensure the supremacy of the United States Constitution and federal laws. *See, e.g., Daniels v. Allen*, 344 U.S. 443, 510 (1953) (jurisdiction established through 28 U.S.C. § 2254 is "one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law" and "merely expresses the choice of Congress how the superior authority of federal law should be asserted"); H.R. Rep. No. 100-660, *8 (1988), *reprinted in* 1988 U.S.C.C.A.N 766, 773 (in the course of amending 28 U.S.C. § 1257 to eliminate mandatory review, Congress recognized that the purpose of the statute is to "ensure the supremacy of Federal laws").

Therefore, at its core the doctrine of adequacy and independence functions to maintain federal authority over the protection of constitutional rights and supremacy of federal law. *See, e.g., Lee v. Kemna*, 534 U.S. at 388 (Kennedy, J., dissenting) (noting that the "rule that an adequate state procedural ground can bar federal review of a constitutional claim ... respects state rules of procedure while ensuring that they do not discriminate against federal rights"); *Abie State Bank v. Weaver*, 282 U.S. 765, 773 (1931) (determination whether an asserted nonfederal ground adequately supports a judgment is required "in order that constitutional guaranties may appropriately be enforced"); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) ("If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds."). Indeed, the rule of adequacy "rest[s] on nothing less than this Court's ultimate

authority to review state-court decisions in which 'any title, right, privilege, or immunity is specially set up or claimed under the Constitution.'" *Howlett*, 496 U.S. at 366, n.14 (quoting 28 U.S.C. § 1257(a)).

It is not disregard for state tribunals, as the Warden and his *amicus* suggest, but obligation to these constitutionally and legislatively mandated powers that creates for federal courts an "independent duty to scrutinize the application of state rules that bar our review of federal claims." *Cone v. Bell*, __ U.S. __, 129 S. Ct. 1769, 1782 (2009). Viewed in the context of the Court's proper role, it is plain that eliminating or diminishing searching inquiry into the adequacy of state procedural bars to federal review would simply invite discrimination, intended or not, against federal interests.

B. This Court has required the regular application of a state procedural rule among similar cases before the rule may bar federal review.

The Court's requirement that procedural rules be regularly and consistently applied reflects its constitutional and statutory obligation to make certain that state courts do not "avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims," *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982), and has long served to strike the proper balance between concerns for comity and federalism and the duty of federal courts to protect and achieve "desirable uniformity in adjudication of

federally created rights," *Brown v. Western Ry. of Ala.*, 338 U.S. 294, 299 (1949); *see also Michigan v. Long*, 463 U.S. 1032, 1039 (1983) (an "*ad hoc* method of dealing with cases that involve possible adequate and independent state grounds is antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved"); *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 401 (1981) (observing that "justice is achieved when a complex body of law developed over a period of years is evenhandedly applied") (internal quotation omitted).[6]

It is notable that, in arguing that "fair notice" is the basis for the Court's rulings on the adequacy of state procedural rules, the Warden ignores the overwhelming number of cases discussing the requirement that a rule be regularly applied and instead cites only three cases that address the adequacy of a state procedural rule: *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), *Wright v. Georgia*, 373 U.S. 284 (1963), and *Johnson v. Mississippi*, 486 U.S.

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[6]As one constitutional scholar has explained, such uniformity motivated the creation of a federal judiciary:

> In large part, federal courts were desired to effectively implement the powers of the national government; there was a fear that state courts might not fully enforce and implement federal policies, especially where there was a conflict between federal and state interests. At a minimum, a federal judiciary could help provide the uniform interpretation of the Constitution and laws of the United States.

Erwin Chemerinsky, FEDERAL JURISDICTION 2 (2d ed. 1994).

578 (1988). (Petr.'s Br. at 19-20.) The *NAACP* and *Wright* cases do address circumstances in which there was *no* notice of the state procedural rule prior to its application to bar review of federal claims, but they are among a very small number of cases decided primarily on this basis.[7] In *Johnson v. Mississippi*, however, there is no suggestion that the petitioner lacked notice of the rule applied – a requirement that petitioner's challenge to his sentence should have been raised on direct appeal. *Id.* at 587. Instead, the Court reviewed state court rulings in similar contexts and found "no evidence that the procedural bar relied on by the Mississippi Supreme Court here has been consistently or regularly applied. Rather, the weight of Mississippi law is to the contrary." *Id.*[8]

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[7] In addition to *NAACP* and *Wright*, this category includes *Ford v. Georgia*, 498 U.S. 411, 424 (1991) (rejecting state ruling that claim brought pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), was not timely presented where the rule did not exist when the claim was raised).

[8] Although the Warden acknowledges that the Court has inquired into "the state court's enforcement of procedural forfeitures" in some cases (Petr.'s Br. at 26), he also suggests that such an inquiry is not conducted in habeas corpus cases, stating that there is "no habeas corpus case in which this Court has invalidated a state procedural rule based upon 'inconsistent' results in the application of the procedural rule in other cases." (Petr.'s Br. at 27). This is simply incorrect. In *Johnson v. Mississippi*, *supra*, a habeas corpus proceeding initiated in state court, this Court declined to give preclusive effect to an application of a state procedural rule because it was not "consistently or regularly" applied. 468 U.S. at 587. In another habeas corpus case, *Dugger v. Adams*, 489 U.S. 401 (1989), the Court similarly addressed whether the state applied its procedural rule

The Warden also confuses requirements under the Court's adequate and independent state ground doctrine with due process, citing without discussion *United States v. Harriss*, 347 U.S. 612, 617 (1954), a case that addresses the constitutional requirements of definitiveness for criminal statutes. (*See* Petr.'s Br. at 9; *see also* Amicus at 19 (similarly referencing another case involving the constitutionality of criminal statutes, *Walker v. Birmingham*, 388 U.S. 307, 320 (1967)).) The constitutional standard for clarity in criminal statutes, as well as the "reasonable opportunity" standard of procedural due process, *Davis v. Scherer*, 468 U.S. 183, 200 (1984), that the *amicus* favors (*see, e.g.*, Amicus at 6), do not address the distinctive role that the federal courts have within the constitutional and statutory framework of state and federal interests, or the long-standing requirements of the adequate and independent state ground doctrine that have developed to serve that role. *See* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1160 (1986) (observing that the question of whether a state procedural rule is adequate is not the same as the question of whether it violates due process).

Instead, in no less than thirteen cases decided in the past fifty-five years, this Court has inquired into the context in which the state procedural rule was applied and whether the rule was applied in the same manner among similar cases. These civil and criminal cases, decided on direct review with the exceptions of *Johnson v. Mississippi*, *supra*, and *Dugger v. Adams*, *supra*, comprise a significant portion of the Court's precedent

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"consistently and regularly" and found that it had. *Id.* at 410, n.6.

on the adequacy of state procedural rules.[9] They demonstrate that consistent or regular application of state procedural rules has been a critical consideration in determining the adequacy of state defaults:[10]

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[9]In addition to the limited number of cases that address novel procedural rules, *see* note 7, *supra*, there is another subset of cases in which the Court has not inquired into the regularity of the rule's application. In these cases, the Court's ruling on adequacy reflects unique circumstances in which state interest in the asserted rule was not legitimate or the Court viewed the rule as unnecessarily burdening federal rights. *See Osborne v. Ohio*, 495 U.S. 103, 125 (1990) (ruling that the specific objection required would have been futile); *Douglas v. Alabama*, 380 U.S. 415, 422-23 (1965) (ruling that "[n]o legitimate state interest would have been served by requiring repetition of a patently futile objection, already thrice rejected"); *Shuttlesworth v. Birmingham*, 376 U.S. 339, 339 (1964) (per curiam) (ruling that where the state procedural failing is minor, such as using the wrong type of paper, it is not sufficient to prevent review of a federal constitutional issue); *Brown v. Western Ry. of Ala.*, 338 U.S. at 298 (rule to construe pleadings against pleader was a "[s]trict local rule of pleading [that] cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws"); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (rule of local practice was not sufficient to bar defense provided by federal statute); *Rogers v. Alabama*, 192 U.S. 226, 230 (1904) (ruling that a state court may strike a pleading for prolixity, but not if the pleading is two pages long).

[10]In its Brief *Amicus Curiae*, CJLF attempts to portray great confusion in the Court's precedents regarding the adequacy of state defaults. (Amicus at 10-15.) CJLF's approach, however, focuses mainly on "phrases offered up" in a scattering of cases. (*Id.* at 11.) This method of parsing isolated words and phrases from a group of cases does little to illuminate the Court's precedent and artificially suggests great variance where, as will be demonstrated in the following discussion of cases, there is actually

- *Williams v. Georgia*, 349 U.S. 375 (1955): The state court ruled that a jury composition challenge presented in an extraordinary motion for new trial could not be reviewed because it had not been raised previously. *Id.* at 379. This Court reviewed fifteen state decisions addressing the same type of claim, *id.* at 384-89, and concluded that for such cases, "[i]n practice Georgia appellate courts have not hesitated to reverse and grant a new trial," *id.* at 384. Although the state court ruling at issue was discretionary, the Court questioned the adequacy of the rule because "[a] state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner rule." *Id.* at 383.

- *Staub v. Baxley*, 355 U.S. 313 (1958): The state court ruled that a First Amendment challenge to a conviction for union organizing could not be reviewed because of pleading deficiencies. *Id.* at 320. This Court determined that the same form of pleading rejected in Staub's case was recognized as sufficient in a case four years prior that was based on "a long line of [the state court's] own decisions." *Id.* The Court criticized the "meaningless form" adhered to in dismissing the claims and pointed to "arbitrariness" in the application of the rule in determining that the state ruling was "without fair or substantial

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a great deal of consistency.

support." *Id.*

- *Wolfe v. North Carolina*, 364 U.S. 177 (1960): The state court refused to review Fourteenth Amendment and supremacy claims that it did not give conclusive effect to a federal court's fact findings and judgment in a prior civil action because the federal court transcript was not made part of the appellate record. *Id.* at 189. This Court examined the "whole course of North Carolina decisions," *id.* at 194, and cited eight "illustrative decisions" in determining that the court had "consistently and repeatedly held in criminal cases that it will not make independent inquiry to determine the accuracy of the record before it," *id.* at 189. The Court concluded that the state court had not "arbitrarily denied the appellants an opportunity to present their federal claim." *Id.* at 194.

- *New York Times v. Sullivan*, 376 U.S. 254 (1964): The state court held that a claim that it overreached the territorial limits of due process in assuming jurisdiction over the corporate person of the *New York Times* could not be reviewed because the newspaper waived the objection by making a general appearance. *Id.* at 265, n.4. This Court concluded that the ruling had "fair or substantial support" in prior Alabama decisions. *Id.*

- *Barr v. Columbia*, 378 U.S. 146 (1964): The state court asserted that constitutional challenges to a

breach-of-peace conviction could not be reviewed because they were too general to be considered. *Id.* at 149. This Court determined that in four other cases in the course of two months the state court addressed identically-pled claims in similar circumstances without applying this rule. *Id.* The Court concluded that the rule was not "strictly or regularly followed" so as to bar review of federal claims. *Id.*

- *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964): The state court refused to review a challenge to the constitutional validity of a restraining order preventing the NAACP from doing business in state because of a pleading deficiency. *Id.* at 295. This Court reviewed twelve similarly pled cases as well as a number of other cases raised by the state. *Id.* at 297-301. The Court concluded that the rule was not adequate because the "Alabama courts have not heretofore applied their rules respecting the preparation of briefs with the pointless severity shown here." *Id.* at 297.

- *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969): The state court ruled that discrimination claims raised by an African American family prevented from using a community swimming pool could not be reviewed because of a failure to provide sufficient notice for opposing counsel to object to the transcript submitted as the record on appeal. *Id.* at 233. This Court cited three previous decisions that applied the rule in a

contrary fashion. *Id.* Although the Court commented that the rule was "more properly deemed discretionary than jurisdictional," it ruled that the state court "has not consistently applied its notice requirement as to amount to a self-denial of the power to entertain the federal claim." *Id.* at 233-34.

- *Hathorn v. Lovorn*, 457 U.S. 255 (1982): The state court held that claims under the Voting Rights Act could not be reviewed because they were raised for the first time in a petition for rehearing. *Id.* at 363. This Court noted that the cases provided to support the rule did not address its application after 1969 and cited twelve contrary cases decided more recently in which the state court "regularly grants petitions for rehearing without mentioning any restrictions on its authority to consider issues raised for the first time in the petitions." *Id.* The Court concluded that the rule was not "consistently relie[d] upon," was applied "only irregularly," and that it could not be said to be "strictly or regularly followed." *Id.* at 264-65.

- *James v. Kentucky*, 466 U.S. 341 (1984): The state court ruled that a constitutional violation based on denial of the defendant's request that the jury be admonished from drawing an adverse inference from his decision not to testify could not be reviewed because he was entitled to ask for an "instruction" rather than "admonition," but did not do so. *Id.* at 344. This Court reviewed

and discussed the state law at length, concluding that the rule was "not always clear or closely hewn to," *id.* at 346, and thus was not "firmly established and regularly followed" so as to bar review, *id.* at 348.

- *Johnson v. Mississippi*, 486 U.S. 578 (1988): The state court refused to review petitioner's constitutional challenges to a sentence based on a prior, invalid conviction because they should have been raised on direct appeal. *Id.* at 587. This Court found "no evidence that the procedural bar relied on by the Mississippi Supreme Court here has been consistently or regularly applied" and determined that "the weight of Mississippi law is to the contrary." *Id.* at 587. The Court concluded that the rule was not "strictly or regularly followed" so as to bar review. *Id.*

- *Dugger v. Adams*, 489 U.S. 401 (1989): The state court ruled that petitioner's claim brought pursuant to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), could not be reviewed because it was not raised on appeal. 489 U.S. at 410, n.6. This Court cited seventeen cases addressing this rule, finding that "[i]n the vast majority of cases ... the Florida Supreme Court has faithfully applied its rule." *Id.* The Court concluded that the rule was "consistently and regularly" applied and was adequate to bar review. *Id.*

- *Jimmy Swaggart Ministries v. Bd. of*

Equalization, 493 U.S. 378 (1990): The state court concluded that due process and Commerce Clause challenges to taxation were procedurally barred because they had not been administratively exhausted. *Id.* at 399. The Court concluded that there was no indication that the state rule was applied in an "irregular, arbitrary, or inconsistent manner," and that it was adequate to bar review. *Id.* at 399.

- *Moore v. Texas*, 535 U.S. 1110, 122 S. Ct. 2350 (2002): The state court concluded that successive habeas petitions could not be reviewed because they were an abuse of the writ under state law. *Id.* at 2352. Justices dissenting from a stay of execution determined that the rule "has been regularly followed by Texas courts" and concluded that the rule was adequate to bar review. *Id.*

Although these cases are primarily civil and criminal cases decided on direct review, they provide the requirement for regular and consistent application of state procedural rules that is utilized by the federal courts in their review of procedural defaults in cases brought pursuant to 28 U.S.C. § 2254.[11]

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[11] *See, e.g., Janosky v. St. Amand*, 594 F.3d 39, 44 (1st Cir. 2010) ("We have held, with a regularity bordering on the monotonous, that the Massachusetts requirement for contemporaneous objections is an independent and adequate state procedural ground, firmly established in the state's jurisprudence and regularly followed in its courts.") (citing *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988)); *Bronshtein v. Horn*, 404

In recent cases in which the Court did not need to inquire into the adequacy of the state procedural rule, it nonetheless acknowledged that the test for adequacy includes a requirement that the rule is regularly followed. *See Lee v. Kemna*, 534 U.S. at 381 ("Ordinarily, violation of 'firmly established and regularly followed' state rules – for example, those involved in this case – will be adequate to foreclose review of a federal claim."); *Smith v. Texas*, 550 U.S. 297, 313 (2007) ("In order to be 'adequate,' a state rule must be a 'firmly established and regularly followed state practice,' and should further a legitimate state interest."); *Beard v. Kindler*, ___U.S.___, 130 S. Ct. 612, 617 (2009) ("We have framed the adequacy inquiry by

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F.3d 700, 708 (3rd Cir. 2005) (citing this Court's direct review cases and observing that "[t]he requirement of regular application ensures that review is foreclosed by what may honestly be called 'rules' – directions of general applicability – rather than by whim or prejudice against a claim or claimant"); *McNeill v. Polk*, 476 F.3d 206, 211 (4th Cir. 2007) (state procedural rule "is adequate if it is regularly or consistently applied by the state courts") (citing *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988)); *Henderson v. Cockrell*, 333 F.3d 592, 604 (5th Cir. 2003) ("state procedural rule is adequate if it is 'firmly established' and regularly and consistently applied by the state court") (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984) and citing *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988)); *Haliym v. Mitchell*, 492 F.3d 680, 693, n.6 (6th Cir. 2007) ("[T]he dismissal of a claim pursuant to a state procedural rule does not bar federal habeas review if that state rule is not 'consistently or regularly applied.'") (quoting *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988)); *Barnett v. Roper*, 541 F.3d 804, 808 (8th Cir. 2008) (state procedural rule "is adequate only if it is a 'firmly established and regularly followed state practice'") (quoting *James v. Kentucky*, 466 U.S. 341, 348-49 (1984)).

asking whether the state rule in question was 'firmly established and regularly followed.'").[12]

The complaint that specific words, such as "strictly" in *Barr v. Columbia*, 378 U.S. at 149, have "been the source of much mischief" (Amicus at 14), finds no support in the Court's precedent, which demonstrates the same inquiry for adequacy over time, one focused on state law and practice among similar cases to determine whether a state procedural rule is regularly and consistently applied.[13] Not surprisingly, this is the same inquiry that was employed by the Ninth Circuit in this case. *Martin v. Walker*, 357 Fed. Appx. 793, 794 (2009) (inquiring whether California's

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[12]Although the Court's inquiry has long addressed whether a rule is regularly or consistently followed, the "firmly established" component of the Court's current formulation of the rule appears to address the fact that novel rules may not bar federal review.

[13]*See Moore v. Texas*, 535 U.S. 1110, 122 S. Ct. 2350, 2353 (2002) (state rule "regularly followed"); *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 399 (1990) (state rule not applied in an "irregular, arbitrary, or inconsistent manner"); *Dugger v. Adams*, 489 U.S. 401, 410, n.6 (1989) (state rule was "consistently and regularly" applied); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (state rule not "consistently or regularly applied"); *James v. Kentucky*, 466 U.S. 341, 351 (1984) (state rule not "regularly followed"); *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) (state rule not "consistently relie[d] upon"); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 234 (1969) (state rule not "consistently applied"); *Barr v. Columbia*, 378 U.S. 146, 149 (1964) (identically-pled claims treated differently in different cases); *Staub v. Baxley*, 355 U.S. 313, 320 (1958) (state rule applied arbitrarily); *Williams v. Georgia*, 349 U.S. 375, 383 (1955) ("kindred issues raised in the same manner" treated differently).

rule was "well established and consistently applied") (internal quotation omitted).[14]

III. The contention that adequacy is a judge-made doctrine designed to combat racial bias is both historically inaccurate and a distortion of relevant statutory language.

The Warden and his *amicus* attribute the doctrine of adequacy to the Court's reaction to invidious discrimination during the civil rights era and its suspicion of state court hostility to federal law during that time. (*See* Petr.'s Br. at 23-24; Amicus at 17.) They argue that because such discrimination no longer exists, inquiry into the adequacy of state rules has

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[14]Petitioner's claim that the cause and prejudice exception to permit review despite a state procedural default is a sufficient replacement for the current adequacy inquiry is without merit. The cause and prejudice exception presupposes a state court's invocation of a valid procedural bar. Inadequate rules are not valid bars, for "if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." *County Ct. of Ulster County v. Allen*, 442 U.S. 140, 154 (1979). Moreover, unlike the adequacy inquiry, which functions to ensure similar treatment of federal claims across many cases, the cause and prejudice exception addresses deficiencies in individual cases based on "some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (citing interference by officials or incompetence of counsel). The existence of a cause and prejudice exception to address these individual circumstances is wholly unrelated to the inquiry for adequacy of state procedural defaults.

outlived its usefulness. This view of the doctrine not only is contrary to the Court's duty to ensure uniform adjudication of federal rights, discussed above, but also ignores the role of the Court in preventing discrimination against federal interests in a wide variety of contexts. Viewing the historical role of the doctrine of adequacy, it is apparent that the Court protects a variety of federal rights from states' failure to adjudicate them on the basis of procedural rulings, including the following:

- Federal property disputes, *see Tyler v. Magwire*, 84 U.S. at 287 (holding inadequate a state ruling that suit for transfer of land title could not be maintained because it was brought in the wrong court);

- Rights of incorporation under federal law, *see Creswill v. Grand Lodge*, 225 U.S. 246, 261 (1912) (holding inadequate a state's refusal to consider statute of limitations as a defense in suit over organizational incorporation);

- Federal immunities, *see Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (holding inadequate state pleading requirements that precluded federal immunity limitation);

- Federal tort claims, *see Brown v. Western Ry. of Ala.*, 338 U.S. 294, 299 (1949) (holding inadequate state construction of pleadings that barred claim);

- Constitutional challenge to moral character requirements for state bar, *see Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 258 (1957) (holding inadequate state rule that failure to plead with specificity precluded review of claims);

- Voting rights, *see Hathorn v. Lovorn*, 457 U.S. 255, 263-64 (1982) (holding inadequate state rule for timely presentation of claims); and

- Federal pre-emption, *see Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 388-89 (1986) (holding inadequate state ruling that failure to raise pre-emption under the National Labor Relations Act as an affirmative defense resulted in its waiver).

Of course, the view of the Warden and his *amicus* also ignores the Court's statutory obligations in federal habeas proceedings and the importance of the writ in American history and contemporary society. In amending the statutory scheme governing federal habeas review in the Antiterrorism and Effective Death Penalty Act of 1996, Congress apparently altered the grant of jurisdiction over cases that come within the requirements of Chapter 154 of Title 28, limiting the federal courts' review to claims decided on the merits in state court. *See* 28 U.S.C. § 2264(a). By making no similar alteration for cases brought pursuant to 28 U.S.C. § 2254, Congress effectively codified the Court's existing approach to abstention in those cases, namely, the adequate and independent state ground doctrine. *See, e.g., Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir.

1998) (recognizing that Congress left intact pre-AEDPA procedural default law for cases raised under § 2254); *Truesdale v. Moore*, 142 F.3d 749, 752, n.2 (4th Cir. 1998) (same).

In spite of statutory limitations on habeas corpus jurisdiction and this Court's own restraint through the adequate and independent state ground doctrine, the writ of habeas corpus remains an important feature of our legal system. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 745 (2008) ("the essential design of the Constitution ... ensures that, except during periods of formal suspension, the Judiciary will have a time tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty.") (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004)). Extending federal abstention in the manner proposed by the Warden and his *amicus* implies that the Court's role is inconsequential in the protection of federal rights and interests. The traditions and history of Anglo-American jurisprudence dictate otherwise.

IV. The application of procedural defaults in federal cases does not justify modifying the test for adequacy that federal courts apply to state rules.

The Warden and his *amicus* also assert that the inquiry into the adequacy of state procedural rules should be truncated or eliminated because it is inconsistent with this Court's treatment of federal procedural defaults, particularly those allowing for

judicial discretion. (*See* Petr.'s Br. at 12, 26, 33.) According to Warden's view, "[i]t does not appear that federal courts hesitate, and undertake a review of their 'consistent' enforcement of such rules in other cases before accepting their procedural rules as valid." (*Id.* at 26.) In fact, application and review of procedural default in the federal courts *is* carefully guided and reviewed to ensure consistent enforcement of procedural rules.

Plain error review under Federal Rule of Criminal Procedure 52(b), an example cited by the Warden of a rule for which "there apparently is no 'adequacy' scrutiny into 'consistent' application" (*id.* at 33), is "strictly circumscribed," *Puckett v. United States*, ___U.S.___, 129 S. Ct. 1423, 1428 (2009). This Court oversees appellate courts' application of the plain error exception to procedural default with a multi-part test that inquires into whether "legal error" exists that is "clear or obvious" and "affected the appellant's substantial rights." *Id.* at 1429. If these three elements are satisfied, the appellate court has discretion to remedy the error only if it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.*; *see also United States v. Frady*, 456 U.S. 152, 163 (1982) ("recourse may be had to the Rule [52(b)] only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it"). This Court has noted that "[m]eeting all four prongs is difficult, as it should be," *Puckett*, 129 S. Ct. at 1429, and the Court is vigilant in its review of Rule 52(b) cases and resolution of circuit splits to further ensure the narrow and consistent application of the Rule, *see, e.g.*, *id.* at 1428 (resolving a

circuit split as to whether Rule 52(b) applied to a forfeited claim that the Government failed to meet its obligations under a plea agreement); *Johnson v. United States*, 520 U.S. 461, 465 (1997) (resolving a circuit split as to whether relief for a plain error should issue where the evidence of the defendant's guilt was overwhelming); *Frady*, 456 U.S. 152 (granting certiorari to clarify that Rule 52(b) did not apply to cases brought under § 2255, but only to cases brought on direct appeal).

The same key features apparent in Rule 52(b) – express standards combined with regular appellate oversight to clarify the application of procedural rules – ensure that other federal rules are governed in a manner that is similar to federal court review of state rulings. For example, in addressing dismissal of habeas petitions for delay under former Habeas Rule 9, the Court highlighted the fact that "Congress, the Rule writers, and the courts have developed more complex procedural principles that regularize and thereby narrow the discretion that individual judges can freely exercise." *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996).[15] In reversing the lower court's dismissal of a petition because it was based on an "ad hoc departure from settled rules," *id.* at 324, the Court in *Lonchar* cited the "importance, in order to preclude individualized enforcement of the Constitution in

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[15] *Amicus* CJLF asserts that pre-AEDPA Habeas Rule 9 is similar to California's timeliness rule. (Amicus at 26.) As the discussion in *Lonchar* demonstrates, however, discretion under the Rule was guided according to principles that governed the district courts.

different parts of the Nation, of lay[ing] down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State Courts." *Id.* at 323-24.

The application of additional federal rules that the Warden cites – discretion to excuse a state's failure to raise affirmative defenses as addressed in *Granberry v. Greer*, 481 U.S. 129, 136 (1987), and *Day v. McDonough*, 547 U.S. 198, 210-11 (2006) – is similarly circumscribed. The Court in *Granberry* explained that excusing the failure to exhaust claims was guided by a "strong presumption in favor of requiring the prisoner to pursue his available state remedies." 481 U.S. at 131. This general guidance was further directed by examples provided by the Court, such as the following:

> If, for example, the case presents an issue on which an unresolved question of fact or of state law might have an important bearing, both comity and judicial efficiency may make it appropriate for the court to insist on complete exhaustion to make sure that it may ultimately review the issue on a fully informed basis. On the other hand, if it is perfectly clear that the applicant does not raise even a colorable federal claim, the interests of the petitioner, the warden, the state attorney general, the state courts, and the federal courts will all be well served even if the State fails to raise the exhaustion defense.

Id. at 134-35. The guidelines discussed in *Granberry* later were referenced and utilized in *Day* in the context of excusing untimely petitions. 547 U.S. at 208.

The important role of appellate guidance for, and review of, federal courts' application of discretionary rules recently was recognized by this Court in *Holland v. Florida*, __U.S.__, 130 S. Ct. 2549 (2010), which addressed equitable tolling of the one-year statute of limitations for habeas corpus petitions arising from state convictions. The Court noted that "given the long history of judicial application of equitable tolling, courts can easily find precedents that can guide their judgments." *Id.* at 2563. Furthermore, the circuit courts, in turn, similarly guide and circumscribe the district courts' discretion in this arena. *See, e.g.*, *Valverde v. Stinson*, 224 F.3d 129, 133, 134 (2nd Cir. 2000) (reversing district court ruling after determining that confiscation of a prisoner's legal papers by a corrections officer shortly before the filing deadline justified equitable tolling); *Hardy v. Quarterman*, 577 F.3d 596, 598 (5th Cir. 2009) (reversing district court in holding that equitable tolling was warranted where petitioner did not receive timely notice of the denial of his state habeas petition despite his multiple inquiries to the Court of Criminal Appeals); *Spottsville v. Terry*, 476 F.3d 1241, 1245 (11th Cir. 2007) (reversing district court in holding that equitable tolling was appropriate when *pro se* petitioner's delay was due to actively misleading filing instructions).

The framework of appellate review, clearly guided and limited discretion, and uniformly applicable resolution of discrepancies in the federal courts' applications of federal rules by this Court, function to

ensure consistent application of procedural default in federal cases. The Warden and his *amicus* err in claiming disparate treatment of federal and state defaults, and that such supposed treatment justifies elimination of an adequacy inquiry, which, contrary to their allegations, functions much like federal courts' review of federal defaults.

CONCLUSION

The Court's existing doctrine regarding the treatment of state procedural defaults is well established, well understood, and has successfully served the federal courts in the exercise of their constitutional and statutory authority. The Warden and his *amicus* offer no compelling reason to disrupt it.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-996

In The Supreme Court of the United States

JAMES WALKER, Warden, et al ,

Petitioners,

v

CHARLES W MARTIN,

Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. In 2002, appointed counsel filed on Respondent Martin's behalf a second application for habeas corpus relief in the California Supreme Court. The claims raised in that petition were virtually identical to Martin's prior, timely state petition. The second petition was summarily denied in an order that cited *In re Clark*, 5 Cal 4th 750, and *In re Robbins*, 18 Cal. 4th 770, 780 (1998), ambiguously signifying some or all of the claims were untimely. *Clark* discusses a variety of California habeas procedural bars, including a general on the reconsideration of claims raised and rejected in a prior habeas petition, which may be deemed untimely Where relief is denied under such circumstances, is the state-court ruling adequate to bar federal review?

2 Whether a state-court practice of determining the timeliness of non-capital habeas petitions on a case-by-case, claim-by-claim basis, with no established rule or principle for deciding either when a petition is untimely or whether its untimeliness will be ignored – a practice that has resulted in inconsistent treatment of similarly situated habeas petitioners – constitutes an "adequate" state procedural ground for extinguishing a federal constitutional claim

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INTEREST OF AMICI CURIAE[1]

Amici are the federal defender organizations for the four federal districts within the State of California. Amici are often appointed as counsel in federal habeas corpus proceedings brought on behalf of indigent prisoners in California State custody. Amici have a central common interest in the proper interpretation and application of the procedural default doctrine in federal habeas corpus proceedings initiated by those in state custody and, specifically, in ensuring that California habeas petitioners are not denied federal habeas corpus relief as a result of the State's invocation of a procedural bar that is neither clearly defined nor consistently applied

SUMMARY OF ARGUMENT

The California Supreme Court summarily denied Respondent Charles W Martin's second state-court petition for writ of habeas corpus by citing cases discussing California's framework for assessing the timeliness of petitions for writs of habeas corpus including when second or successive applications will be entertained The federal grounds raised in

[1] No part of this brief was authored in whole or in part by counsel for any party No party, counsel for a party or other person made any monetary contribution intended to fund the preparation or submission of this brief The parties have consented to the filing of this brief

Martin's second petition were duplicative of an earlier timely petition. Accordingly, Martin complied with state-court requirements intended to promote the finality of criminal convictions, and the "timeliness" bar is not clearly of the type or scope considered adequate to preclude federal habeas review

Should the Court inquire further into questions of adequacy, it should reject the State's argument that the timeliness framework provides adequate notice of what state-court petitioners must do in order to avoid defaulting their claims. Notwithstanding the State's inaccurate recasting of the timeliness framework as a requirement to file "reasonably promptly," the requirements remain vague and ill-defined. This Court's decisions hold that "reasonableness" conveys meaning only by reference to an express or understood class of comparison, something California courts have chosen not to provide.

The State conceded below that this Court has stated repeatedly that only "firmly established and regularly followed" are adequate to support a procedural default It now impermissibly shifts positions, and asserts that consistency in application has never been a criterion for adequacy, and erroneously contends the lower courts have misconstrued this Court's holdings to permit an "untenable" review of discretionary state procedures On the contrary, the Court of Appeals has honored procedural rules that admit of discretionary exceptions, and, in its review of timeliness, has respected the difference between disparities reflecting an exercise of discretion and

unexplainable inconsistencies indicative of ad hoc decision-making.

The State's argument that upholding California's timeliness framework would require only a straightforward application of *Beard v. Kindler* elides the factual and legal differences between excusing a violation of a determinate rule and unconstrained discretion whether to find a rule applies from one claim to the next. *Beard* neither holds nor suggests that all discretionary rules are adequate The discretionary power of reasoned elaboration involved in *Beard* is the antithesis of the unexplained, silent, and good-for-this-case-only invocations of California's timeliness bars that epitomize the "power of continuing discretion."

The judgment of the Court of Appeals should be affirmed

ARGUMENT

A. For Reasons the State Does Not Challenge, the Procedural Bar Applied to Martin's Claims is Not Adequate

The State's arguments for reversal, and for revising the adequate state ground doctrine are academic The State concedes that under any version of the adequate state ground doctrine, where a state procedural default does not further a legitimate state interest "a federal court's refusal to respect the rule does not offend comity or federalism." Pet. Br. at 11;

see also id. at 22-24.[2] The State also does not take issue with this Court's long held rule that a state law ground for decision is inadequate to preclude federal court review where the state law ground is not broad enough to sustain the judgment denying relief. *See, e.g., Murdock v. Memphis*, 20 Wall. 590, 636 (1887); *Eustis v. Bolles*, 150 U.S 361, 370 (1893). Review of the claims rejected as untimely in Martin's second state habeas corpus petition shows they are repetitive of the grounds for relief Martin timely presented in his first state petition In light of the overlap between the two petitions the state-court's timeliness "defaults" must be deemed inadequate because they do not serve a legitimate state interest, and are not broad enough to preclude federal merits review.

The three federal claims deemed untimely had previously been presented in a state habeas corpus petition that was deemed timely. The commonality between the factual and legal grounds Martin presented in his two state habeas corpus petitions constitutes grounds to reject the State's arguments for any of the following reasons: (a) the California Supreme Court deemed the claims untimely because they were repetitive, *see In re Clark*, 5 Cal. 4th 750, 774 (1993), and relitigation bars do not preclude federal merits review, *Cone v. Bell*, 129 S Ct. 1769, 1781 (2009); *Ylst v Nunnemaker*, 501 U.S. 797, 804 n 3 (1991);

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[2] "Pet Br" refers to the Petitioner's Brief on the Merits Amici will use "CR" to refer to the district court docket entries and "JA" to refer to the Joint Appendix

(b) Martin actually complied with the requirements of California law and the application of the bar serves no state interest that precludes federal review, *Cone, op. cit.*, *Ford v Georgia*, 498 U.S 411, 418-19 (1991); *Henry v. Mississippi*, 379 U.S 443, 448 (1965); (c) delay unrelated to repetitiveness is too narrow a ground to support the state-court's judgment, and the ruling is therefore inadequate for reasons the State does not challenge, *Murdock*, 20 Wall. at 636; *Eustis*, *supra*, 150 U.S at 370. The ambiguity of the state-court's decision in light of the repetitiveness of the claims constitutes grounds for finding the state court did not "clearly and expressly rely on an . . . adequate state ground," *Coleman v Thompson*, 501 U S. 722, 735 (1991), *i.e.*, a rule of the type or breadth that precludes federal merits review. *Illinois v Fisher*, 540 U.S. 544, 547 n.* (2004) (Court may review state-court decision on federal question even where possible adequate state law ground supported decision) (*citing Michigan v Long*, 463 U.S. 1032, 1038 n.4 (1983)).

1. Respondent's Second State Habeas Petition Was Duplicative

Martin initially exhausted state-court remedies in a petition for writ of habeas corpus he filed pro se with the California Supreme Court on July 17, 1998. Exh. D, Fourth Amended Pet (CR 45). That petition was deemed timely, and was denied in an order that cited *In re Waltreus,* 62 Cal. 2d 218, 225 (1965), and *In re Dixon,* 41 Cal 2d 756, 759 (1953), procedural rules

that the State has conceded do not apply to the claims currently before this Court.

Later, Martin's appointed counsel filed a second petition for writ of habeas corpus in the California Supreme Court Exh H, Fourth Amended Pet. (CR 45). Three grounds for relief raised in that second petition are now before this Court because the state court denied those claims in an order that cited *Clark*, *supra*, and *In re Robbins*, 18 Cal. 4th 770, 780 (1998), and Martin's counsel repeated those three grounds for relief in Claims 3, 4, and 6 of an amended federal habeas corpus petition. CR 45. The bases for relief raised in Claims 3, 4, and 6 and Ground 1 of the timely pro se petition are fundamentally the same.

In Claim 3 of the operative federal habeas corpus petition, Martin alleges a violation of the Sixth Amendment under *Strickland v Washington*, 466 U.S. 668 (1984), due to his trial counsel's "failure to develop or present evidence of alibi or that some other person was involved" in the robbery and murder of Charles Stapleton Fourth Amended Pet. (CR 45) at 8. Martin alleges his trial counsel should have pursued evidence such as a fingerprint and statements of witness Bonnie Permenter that implicate Bobby Austin in the crime *Ibid.*

In Ground 1 of his timely pro se petition, Martin alleged "[i]neffective assistance of counsel in violation of petitioner's rights as bestowed upon him by the 6th and 14th amendments U.S.C." and cited *Strickland*. Exh. D (CR 45) at 3, 6. Martin alleged, *inter alia*, his

trial counsel had been ineffective for failing to investigate unidentified fingerprints and a palm print and other evidence implicating Bobby Austin. *Id.* at 4-5

In Claim 4 of the operative federal petition, Martin alleges ineffective assistance of trial counsel "due to counsel's failure to affectively [*sic*] object to the admissibility into evidence" of tape-recorded statements by witness Bonnie Permenter which were "admitted pursuant to Evidence Code Section 1237." CR 45 at 9. Martin alleges his trial counsel failed to prepare for a hearing on the admissibility of the tape, and failed to raise a timely objection to its admittance at trial. *Ibid.* In his supporting points and authorities, Martin asserts that trial counsel should have relied at the admissibility hearing upon an expert witness who would have explained that Permenter's drug and alcohol abuse could have caused her to forget having made her statement to police. *Id* at 27-30 Martin alleges that if counsel had adequately challenged the admissibility of the statement it would have been excluded and "the result would have been either a not guilty verdict, or even a dismissal." *Id* at 32.

In Ground 1 of his timely pro se petition in state court, Martin alleged ineffective assistance under *Strickland* due to his trial counsel's failure to show at the admissibility hearing that the "guidelines and law pursuant to Evidence Code 1237 were not met" because Permenter "could not attest to the truth of her statements." Exh. D (CR 45) at 3. He asserted that his counsel "failed to lay a foundation for exclusion of

statement [*sic*]." *Id.* at 4. Among the facts Martin pointed to was that "Permenter was severely addicted to methamphetamine and alcohol," *id.* at 3, and "did not remember talking to the police or giving the statement." *Id.* at 6. Martin alleged the case against him "was based on a 1986 statement made by Bonnie Permenter," *id.* at 3, and "[a]bsent the statement . . . the evidence would have been insufficient to convict petitioner," *id.* at 6.

In Claim 6 of the operative federal petition, Martin alleges ineffective assistance of his appellate counsel under the *Strickland* standard resulted in constitutional grounds for relief not being preserved for federal review. CR 45 at 11. The question before this Court includes whether federal merits review is available for subsections B and C of Claim 6. In B, Martin alleges his appellate counsel was ineffective because "even though petitioner was absolutely unable to confront and cross-examine Permenter, appellate counsel failed to argue that the appellate court's application of state law, [*sic*] rendered the trial fundamentally unfair in violation of the Due Process Clause." *Id.* at 12 (*citing Estelle v. McGuire*, 502 U.S. 62 (1991)). In section C, Martin alleges his appellate counsel was ineffective for failing to raise in a petition for review in the California Supreme Court "that the admissible evidence was insufficient to support petitioner's conviction for murder and for robbery." *Id.* at 13.

In Ground 1 of his timely, pro se petition Martin alleged ineffective assistance on grounds that

"[a]ppellate counsel failed to incorporate constitutional depravations [*sic*] on direct appeal or review, in violation of federal and state constitutions." Exh. D (CR 45) at 3. Martin alleged that due to appellate counsel's omission of constitutional bases for reversal, he "was subjected to 6th, 7th, and 14th Constitutional depravations [*sic*], that have not been redressed by any *court*." *Id* at 5 (emphasis in original). After referring "to the 1237 issue," Martin alleged "that had a true and meaningful appeal been filed, the conviction would have been reversed. . . Without the illegal statement made by Permenter there would be no evidence to sustain the conviction" *Id.* at 5 As legal authorities supporting his claim, in addition to the Sixth and Fourteenth Amendment references, Martin cited *California v Green*, 399 U.S. 149 (1970). *Id.* at 6.

Regardless of the reasons Martin's first and second state petitions were repetitive, it is clear the district court considered whether Martin's first state petition called into question the timeliness bar. The Magistrate Judge applied the timeliness bar to Claim 4 in part based on the erroneous belief that Martin had attacked the trial court's admission of the Permenter tape "as a 'straight' error claim (not associated with ineffective assistance), and then only on state law grounds." Findings & Recommendations (CR 52) at 21-22 ("The court cannot find that any timely federal claim was ever presented to the state supreme court on the Permenter tapes, and certainly not the present ineffective assistance claim"). In its brief to

the Court of Appeals for the Ninth Circuit, the State described Martin's timely pro se allegations with greater detail and specificity than the quotations appearing *supra*. JA 69-70.

2. Barring Federal Review Would Not Further a Legitimate State Interest

The State correctly asserts that rules promoting the finality of criminal convictions generally serve legitimate state interests. Pet Br at 42 (*citing Teague v. Lane*, 489 U.S. 288, 309 (1989); *Schlup v Delo*, 513 U.S. 298, 322-24 (1995); and *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998)). As to the claims currently in dispute, Martin's first petition for habeas corpus relief in the California Supreme Court complied with all state policies regarding timeliness. Martin's repetitive second state petition was an arid ritual that served no legitimate state or federal interest. *See Henry v Mississippi*, *supra*, 379 U.S. at 448 (noting that purpose of contemporaneous objection rule had been "substantially served" by petitioner's motion for directed verdict); *Staub v. Baxley*, 355 U.S. 313, 319-20 (1958) (failure to challenge "specific sections" of ordinance not adequate state ground barring review of federal claim when party challenged constitutionality of entire ordinance and all sections were "interdependent"); *Lee v. Kemna*, 534 U.S 362, 385 (2002) ("The [state] Rule's essential requirements . . were substantially met in this case. . . . [N]othing would [have] be[en] gained by requiring Lee's counsel to recapitulate in (a), (b),

(c), (d) order the showings the Rule requires ") (internal quotes and citations omitted).

The Tenth Circuit addressed a similar situation in *Johnson v. Champion*, 288 F.3d 1215, 226 (10th Cir. 2002), and concluded that because the state court "had a full and fair opportunity to address the merits of the ineffective assistance claim in the course of Johnson's first application for postconviction relief, it does not matter that a procedural default may have occurred when Johnson again attempted to assert that claim in state court " *Accord*, *Bennett v. Whitley*, 41 F.3d 1581, 1583 (5th Cir. 1994) (although state postconviction court ruled that claims were "barred by procedural default" because they were previously rejected on direct appeal, state rule in question "is not a procedural bar in the traditional sense," and federal habeas corpus review was available)

3. The State-Court's Ambiguous Timeliness Ruling Is Not Broad Enough to Support the Rejection of any Federal Claim

Few principles are better established than the principle that a state-court's reliance on state laws for decision that are not "broad enough" to support its judgment will not bar federal review. *See, e.g.*, *Murdock v. Memphis*, *supra*; *Eustis v. Bolles*, *supra*; *Rutland R.R. v. Central V. R.R.*, 159 U.S. 630, 641 (1895); *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931) The state-court's reference to *In re Clark* in this case is ambiguous, at best, and could indicate the

claims presented in Martin's second petition were rejected in part or in whole on the ground that they were repetitive of those rejected in the prior petition. In *Clark*, the California Supreme Court explained that it considers repetitive claims to be untimely claims. 5 Cal. 4th at 769-70 (equating repetitive and piecemeal claims with untimely claims). The general rule is that ambiguity concerning state-court grounds for decision will render a state procedural bar inadequate to extinguish the federal right. *See Harris v. Reed*, 489 U.S. 255 (1988); *Michigan v. Long*, 463 U.S. 1032 (1983). It is the job of federal courts to "ascertain for themselves if the petitioner is in custody pursuant to a state-court judgment that rests on independent and adequate state grounds." *Coleman v. Thompson*, 501 U.S. 722, 736 (1991).

Taken in the light most favorable to the State, the California Supreme Court deemed the legal bases for relief Martin raised in his second petition untimely because they were repetitive, and rejected any truly new factual basis for relief as untimely due to delay or a failure to justify "substantial" delay. The only new factual material in the second petition was the allegation that trial counsel should have relied upon an expert witness to show that witness Permenter's prior out-of-court statements were inadmissible because her drug use rendered her unable to vouch for their veracity. Martin had alleged in his initial state habeas petition that Permenter's drug use rendered her unable to recall her prior statements. A refusal to consider on timeliness

grounds the additional allegation regarding the expert is not broad enough to support the complete denial of relief Under California law a petition for writ of habeas corpus based on grounds raised in a previously denied petition will be denied when "there has been no change in the facts or law substantially affecting the rights of the petitioner." *In re Martin*, 44 Cal 3d 1, 27 n.3 (1987) (*citing In re Miller*, 17 Cal. 2d 734, 735 (1941)) The citations to *Clark* and *Robbins*, 18 Cal. 4th at 780, signifying untimeliness are therefore of insufficient breadth to support the judgment. The State has never questioned inadequacy of this type. The Court should deem the bar inadequate and should decline to reach the question upon which *certiorari* was granted. In the event that the Court deems it appropriate to proceed beyond the issues discussed above, amici curiae will proceed to the reasons, in addition to those presented by Respondent, that defaults imposed under California's timeliness framework are inadequate to bar federal review.

B. California's Timeliness Framework Cannot Be Reduced to a Mere Requirement that Claims be Filed "Reasonably Promptly" and Even If It Could, Its Requirements Would Still Be Unclear

The State attempts to bootstrap its arguments regarding fair notice by asserting that California's timeliness framework passably can be reduced to a requirement of "reasonable promptness." *See, e.g.*,

Pet Br. at 14, 37, 38 That attempt to eliminate the complexities that deprive California habeas petitioners of notice when to file should not be countenanced.

1. California Has a Timeliness "Framework," Not a Timeliness Rule

"The state Supreme Court has not established a time limit for the presentation of claims in a habeas petition." *In re Sodersten*, 146 Cal App. 4th 1163, 1221 (2007) (*citing In re Huddleston*, 71 Cal. 2d 1031, 1034 (1969)). There is, however, an equitable procedural bar for lack of diligence that was discussed at length in *In re Clark*, 5 Cal 4th 750, 765 (1993).

Clark discusses many of the procedural doctrines upon which a California court may summarily deny habeas relief, but it is frequently cited for its discussion of the interrelated policies against repetitious, successive and delayed claims for relief With respect to successive and repetitive applications for relief, *Clark* noted that the California Supreme Court's

> past decisions have . . suggested that the rules against piecemeal presentation of claims and repetitious petitions are subject to undefined exceptions and that the court may be willing to entertain multiple

> collateral attacks on a judgment notwithstanding the potential for abusive writ practice

5 Cal 4th at 768. In an effort to provide greater certainty, the court stated, in relevant part, that henceforth,

> [b]efore considering the merits of a second or successive petition, a California court will first ask whether the failure to present the claims underlying the new petition in a prior petition has been adequately explained, and whether that explanation justifies the piecemeal presentation of the petitioner's claims. This requirement is reasonable in view of the interest of the state in carrying out its judgments, the interest of the respondent in having the ability to respond to the petition and to retry the case should the judgment be invalidated, and the burden on the judicial system.
>
> In assessing a petitioner's explanation and justification for delayed presentations of claims in the future, the court will also consider whether the facts on which the claim is based, although only recently discovered, could and should have been discovered earlier A petitioner will be expected to demonstrate due diligence in pursuing potential claims. If a petitioner had reason to suspect that a basis for habeas corpus relief was available, but did nothing to promptly confirm those suspicions, that failure must be justified.

> However, where the factual basis for a claim was unknown to the petitioner and he had no reason to believe that the claim might be made, or where the petitioner was unable to present his claim, the court will continue to consider the merits of the claim if asserted as promptly as reasonably possible. And, as in the past, claims which are based on a change in the law which is retroactively applicable to final judgments will be considered if promptly asserted and if application of the former rule is shown to have been prejudicial.
>
> With the exception of petitions which allege facts demonstrating that a fundamental miscarriage of justice has occurred, an exception to be addressed below, unjustified successive petitions will not be entertained on their merits

5 Cal. 4th at 774-75. Not surprisingly, this lengthy description of "timeliness" is rarely set forth in full. On the very page cited in the order denying Martin's second petition, the state court described its approach as a timeliness "framework," *In re Robbins*, 18 Cal. 4th 770, 780 (1998) ("basic analytical framework governing our timeliness determination") The framework is typically paraphrased in terms of the Supreme Court Policies Regarding Cases Arising from Judgments of Death, eff. June 6, 1989, from which much of *Clark*'s discussion drew:

> All petitions for writs of habeas corpus should be filed without substantial delay.

> A petition . . . may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim *and* (b) became aware, or should have become aware, of the legal basis for the claim.
>
> If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay

Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3 ("Standards Governing Filing of Habeas Corpus Petitions and Compensation of Counsel In Relation to Such Petitions"), Part 1 ("Timeliness Standards"), Standards 1-1.1-3.

The State presents a false debate by claiming that the requirement of filing "as promptly as circumstances allow" is clear and unambiguous. Even if this phrase accurately captures the essence of the framework, the requirements of fair notice would not be satisfied.

2. A Requirement of "Reasonable Promptness" Does Not Constitute a Clearly Established Rule

This Court's decisions in various areas of activity stand for the proposition that "reasonableness" conveys

meaning only by reference to an express or understood class of comparison, something California courts have chosen not to provide. For example, *United States v. L. Cohen Grocery Co*, 255 U.S. 81 (1921), considered the specificity of a statute proscribing any "unjust or unreasonable" rate in the handling of any necessaries. In deciding whether the charges against the defendant were within the reach of the statute, this Court focused on

> the certainty or uncertainty of the text in question, that is, whether the words "That it is hereby made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them

Id. at 89. The Court found a lack of notice "so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary," but observed

> that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of

> which no one can foreshadow or adequately guard against

Ibid. Cohen Grocery specifically distinguished cases in which regulations phrased in general terms were upheld by saying that they "all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." *Id.* at 92.

Cline v. Frink Dairy Co., 274 U.S. 445 (1927), involved a vagueness challenge to a Colorado anti-trust statute that permitted certain trade combinations or agreements that would otherwise be unlawful provided that the purpose of the agreement was only to insure a "reasonable" profit. The Court stated,

> it will not do to hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result. When to a decision whether a certain amount of profit in a complicated business is reasonable is added that of determining whether detailed restriction of particular anti-trust legislation will prevent a reasonable profit in the case of a given commodity, we have an utterly impracticable standard for a jury's decision. A legislature must fix the standard more

> simply and more definitely before a person must conform or a jury can act.

Id at 465.

In contrast, the Court has upheld restrictions on unreasonable restraints or prices when "reasonableness" had an adequate denotation in context For example, *Nash v United States*, 229 U S. 373 (1913), relied on the notion that there was a well-developed common-law understanding of what constitutes an unreasonable restraint of trade 229 U.S. at 376-77. Similarly, in *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922), the subject of the inquiry into reasonableness was the amount of the rent fixed by a lease for a dwelling. In that context, the rates charged for the rental of similar dwellings would obviously be available as comparators, *see International Harvester Co. v Kentucky*, 234 U.S. 216, 222 (1914) ("Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator It is a fact, and generally is more or less easy to ascertain.").

This Court has first-hand experience with the impossibility of implementing standards as seemingly simple as "promptly," absent determinate standards. *Gerstein v Pugh*, 420 U S 103 (1975), held that the Fourth Amendment requires a "prompt" judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest Sixteen years later, the Court was forced to revisit the issue:

> Unfortunately, as lower court decisions applying *Gerstein* have demonstrated, it is not enough to say that probable cause determinations must be "prompt." This vague standard simply has not provided sufficient guidance Instead, it has led to a flurry of systemic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations.

County of Riverside v McLaughlin, 500 U.S. 44, 55-56 (1991) (*citing* illustrative cases). In order to end the disruptive consequences of "how prompt is prompt?" the Court recognized it was "important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds" *Id* at 56. The Court balanced the "competing interests articulated in *Gerstein*," and held "that . . . judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." *Id* at 56 [3]

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[3] *Sproles v Binford*, 286 U S 374, 393 (1932), further underscores the importance of an ascertainable common understanding

> The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding *Waters-Pierce Oil Co v Texas (No 1)*, 212 U S 86, 109, *Nash v United States*, 229 U S 373, 377, *Miller v Strahl*, 239 U S 426, 434, *Omaechevarria v Idaho*, 246 U S 343, 348, *Hygrade Provision Co v*

(Continued on following page)

This Court's cases accept "reasonableness" as a requirement when it is set in the context of commonly understood norms. Without a comparison class of understood expectations, "reasonable" is a meaningless concept The requirement that operators of motor vehicles drive at reasonable speeds may seem simple enough. *Cf Miller v Oregon*, 273 U.S 657 (1927) (per curiam) (*explained by Cline*, *supra*, as upholding vehicular manslaughter conviction based on violating speeding statute requiring that drivers proceed "in a careful and prudent manner, not to exceed thirty miles per hour. . . . and in no case at a rate of speed that will endanger the property of another, or the life or limb of any person") But what speed is reasonable varies with context and understood expectations. Reasonable speeds near schools, on expressways, or among competitors at the Indianapolis Speedway are entirely different

Attorneys, much less pro se petitioners in non-capital cases in California, cannot reasonably be presumed to have a shared understanding of what

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Sherman, 266 U S 497, 502, *Bandini Co v Superior Court*, 284 U S 8, 18 The use of common experience as a glossary is necessary to meet the practical demands of legislation In this instance, to insist upon carriage by the shortest possible route, without taking the practicability of the route into consideration, would be but an arbitrary requirement, and the expression of that which otherwise would necessarily be implied, in order to make the provision workable, does not destroy it

constitutes acting as "promptly as circumstances allow." The state courts have not articulated expectations for different circumstances, and have not published reasoned decisions that could serve as a shared set of benchmarks. The only determinate guideline for promptness – the presumptive timeliness date established by the Policies applicable to capital cases – has been held not to apply to non-capital cases. *In re Sodersten*, 146 Cal. App. 4th 1163, 1221 (2007) ("these precise standards do not apply in petitioner's case, since he was not sentenced to death").

When contrasted with this Court's cases on reasonableness, there is an inevitable hollowness to the State's contention that "reasonable promptness" has a meaning specific enough to inform petitioners what they need to do to preserve a federal claim. The threat that they risk default if they proceed in a manner that a court may later deem to have been unreasonable, or if they explain their conduct in a manner a court may later deem an insufficient justification, can only be viewed by petitioners as hopelessly capricious.

The State's oblique references to opinions on diverse topics ranging from comparative negligence to robbery fails to support its position The State cites *American Motorcycle Assn. v. Superior Court*, 20 Cal. 3d 578, 586, 578 P.2d 899, 904 (1978), *Feit v Leasco Data Processing Equipment Corp.*, 332 F. Supp. 544, 568 (E.D.N.Y. 1971); *People v Blakeley*, 23 Cal. 4th 82, 87-88, 999 P.2d 675, 678 (2000), *People v. Nguyen*, 22 Cal. 4th 872, 885-86, 997 P.2d 493, 501

(2000), as a kind of empirical evidence that the terms like "reasonable," "unreasonable" or "substantial" are commonly used to describe some aspect of conduct for which criminal or civil liability could be imposed.[4] None of the cited cases involve a challenge based on lack of notice to any provision proscribing "unreasonable" conduct.[5]

The California Supreme Court has chosen not to adopt a time limit on habeas corpus petitions, not to provide determinate guidelines for non-capital petitioners, and not to define "reasonable promptness" even by providing illustrative example or explanation from time to time. The state-court's preference for the flexibility and variability of its timeliness "framework" does not demand the blind obeisance of the federal courts that the Attorney General desires.

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[4] According to the State, *American Motorcycle* is about a doctrine of "'unreasonable' negligence." Pet. Br. at 38. In fact, the case is about the doctrine of comparative negligence, and the word "unreasonable" appears only in the dissent, in a comment that one of the majority's conclusions was "not unreasonable." 20 Cal. 3d at 611 (Clark, J., dissenting).

[5] Ironically, *Nguyen*'s reference to "substantial" involved a prior holding of the California Supreme Court to add a requirement that the asportation of a robbery victim be "substantial" in order to *narrow* a statute that enhanced criminal liability for *any* asportation of such victim. *Blakely* manifestly involved no issue of notice. Under California law, use of fatal force in self defense is justified if the defendant, under an objective standard of reasonableness, believed himself to be in imminent danger of death or great bodily injury. A subjective good faith belief that is objectively unreasonable is sufficient only to reduce murder to manslaughter.

C. This Court's Jurisprudence Requires an Inquiry into Consistency; *Beard v. Kindler* Neither Renders Such An Inquiry "Untenable" Nor Does It Establish The Adequacy of California's "Discretionary" Timeliness Framework

A considerable portion of the State's Brief on the Merits is devoted to arguing that this Court's repeated use of "firmly established and regularly followed" to describe adequate state rules does not require similarly situated petitioners to receive evenhanded treatment under those rules. In its brief to the Ninth Circuit, however, the State affirmatively asserted that consistent application was required, and did not assert that the lower court had misunderstood the import of this Court's decisions referring to a "firmly established" requirement. *See* JA 95 (Appellee's Brief at 40) ("A procedural default will be found to have been consistently applied if the actual application of the default rule to all similar claims has been even-handed 'in the vast majority of cases.' *Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th Cir. 1996), *Dugger v. Adams*, 489 U.S. 401, 410-412 n.6 (1989)"); *see also* JA 78 ("The District Court correctly concluded that California's timeliness bar has been established as sufficiently clarified and consistently applied since the California Supreme Court decided *Clark* in 1993")

"It is this Court's practice to decline to review those issues neither pressed nor passed upon below." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 224 (1990); *see*

also United States v. Williams, 504 U.S. 36, 42-43 (1992) (party may not urge one position in the court below and after losing reverse its position in this Court). The Court should reject the State's request to hold the Ninth Circuit misunderstood, or should not have applied, decisions from this Court that the State relied upon below *FW/PBS, Inc. v. Dallas*, 493 U.S. at 224.

1. The State's Criticisms of the Ninth Circuit's Approach Are Unfounded

a. The Ninth Circuit has Expressly Held California's Timeliness Rule is Not Inadequate because it is Discretionary; California's Timeliness Policies for Habeas Corpus Petitions Simply Do Not Fulfill Baseline Adequacy Requirements

Relying upon *Beard v. Kindler*, 130 S.Ct. 612 (2009), the State complains that "discretionary" state procedural rules can never be adequate in the eyes of the Ninth Circuit because that court erroneously insists state procedural bars be consistently applied. Pet. Br. at 25-26. On the contrary, the Ninth Circuit has honored procedural rules that admit of discretionary exceptions. *See, e.g., Hurtado v. Kirkland*, 281 Fed.Appx. 724, 2008 WL 2330983 (9th Cir. 2008) (rejecting petitioner's argument that discretion of California Supreme Court Chief Justice to overlook late filing of petition for review rendered California Rule of Court 28(e) inadequate); *Covert v. Hubbard*,

116 Fed.Appx. 871, 872, 2004 WL 2625088 (9th Cir. 2004) (rejecting petitioner's argument "that California's contemporaneous objection rule is not an adequate procedural bar because it requires the exercise of judicial discretion"); *Shumway v. Payne*, 223 F.3d 982, 989 (9th Cir. 2000) (honoring Washington's 1-year limit on personal restraint petitions "[e]ven assuming that the Washington Supreme Court simply chose to disregard their procedural rule to reach the merits in [a] particular death penalty case"), *Vang v. Nevada*, 329 F.3d 1069, 1074 (9th Cir. 2003) (honoring Nevada timeliness rule in noncapital case despite earlier finding that state supreme court exercised discretion not to impose rule in capital cases); *Bargas v. Burns*, 179 F.3d 1207, 1212 (9th Cir. 1999) (honoring Nevada rule against piecemeal presentation of claims although no prior decision of state courts had applied it to present claim).[6] The difference, as we discuss below, is due to California's timeliness framework which has distinguished itself from rules with verifiable grounds for application. The inscrutable and unbridled discretion it confers on state judges cannot be deemed "firmly established or

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[6] In *Bargas*, the court explained, "We do not read decisions from this Court or the Supreme Court as requiring a state court to locate a case law citation that speaks to the very same factual scenario as the one before it prior to invoking the rule of procedural default. Instead, we follow the Supreme Court's dictate that where a rule is sufficiently clear as to put a petitioner on notice that he must raise all claims or risk default, that petitioner must raise all claims."

regularly followed" under *Beard* or any of this Court's precedent

b. The Ninth Circuit's Examination of State Cases to Determine Whether a State Bar is an Adequate is Entirely Appropriate Method of Determining Whether, as a Matter of Federal Law, the Bar is Adequate

Contrary to the position it took in the Ninth Circuit, the State faults the lower court for looking to the state-court's practices "in enforcing a procedural rule in cases other than the petitioner's [which] is almost always misplaced and untenable." Pet. Br. at 25. According to the State, the Ninth Circuit erred long ago in *Morales v. Calderon*, 85 F.3d 1387, 1392 (9th Cir 1996), when it wrote that this Court "has stated that 'a state procedural ground is not "adequate" unless the procedural rule is "strictly or regularly followed."' *Hathorn v. Lovorn*, 457 U.S 255, 262-63 (1982) (*quoting Barr v City of Columbia*, 378 U.S. 146, 149, 12 L Ed. 2d 766, 84 S. Ct 1734 (1964))." The State contends the Ninth Circuit should not have taken *Hathorn* and *Barr* literally, but should have limited its inquiry to a more deferential interpretation of "regular" application The State's criticisms notwithstanding, the Ninth Circuit has engaged in the same methods of consistency review this Court has itself conducted.

For example, in *Dugger v. Adams, supra*, 489 U S 401, defense counsel had failed to object to an

instruction that the jury was not responsible for the sentence to be imposed because sentencing was the judge's decision. Adams argued that Florida's procedural bar against claims that should have been, but were not, raised on direct appeal was inadequate because it had not been "consistently or regularly applied." *Johnson v Mississippi*, 486 U S. 578, 589 (1988), and the Eleventh Circuit agreed that it was "doubtful" that an adequate and independent state law ground existed in the case *Dugger*, 489 U.S. at 410 n.6 This Court upheld the bar, first noting cases in which the rule had been "faithfully" applied, and then examining those cases where the rule was claimed to have been ignored. *Id* at 445 n.6 Based on its examination of the state-court decisions, this Court was unconvinced that the Florida Supreme Court had failed to follow its own rule.

In *James v Kentucky*, 466 U.S. 341 (1984), this Court reviewed a dozen state-court decisions to determine that the Kentucky Supreme Court had a history of inconsistency in distinguishing jury "instructions" from "admonitions " *Id* , 466 U S at 346. Although *Ford v. Georgia*, 498 U S 411 (1991), is most commonly remembered for its holding that a state court may not, consistent with the requirements of the adequate state grounds doctrine, apply a newly-announced rule procedure retroactively, the *Ford* decision was also based on this Court's observation that the state-court's invocation of the alleged waiver rule "fail[ed] the second *James [v. Kentucky]*

requirement that the state practice [has] been regularly followed." *Id.*, 498 U.S. at 425.

c. The Ninth Circuit's Consistency Analysis as An Adjunct to Assessing Vagueness Does Not Fail to Presume that Judges Follow the Law

The State contends the empirical review for consistency demonstrated in *Johnson*, *Dugger*, *James*, and *Ford* violates the presumption that state-court judges, like federal judges, respect their duty to uphold the law. This Court's cases show such review is consistent with comity. Many legal actions are presumed to be correct, but those presumptions can – indeed, must – cede when evidence to the contrary is presented, or our legal system would be incapable of correcting errors.

In criminal cases, reviewing courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and require the defendant to overcome the presumption that counsel's actions resulted from "sound trial strategy." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Judges are presumed to act in good faith and to be impartial arbiters of the law, because as public officials they are presumed to have "properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926), *quoted in Bracy v. Gramley*, 520 U.S. 899, 909 (1997). That presumption will not sustain a judgment

in circumstances "in which experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009) (*quoting Withrow v. Larkin*, 421 U.S. 35, 47 (1975)); *Bracy*, 520 U.S. at 908-09 (discovery, not frequently available to habeas petitioners, allowed on showing that trial judge had accepted bribes to "fix" other cases). Similarly, prosecutors, also public officials presumed to properly discharge their official duties, are bound by that duty to disclose evidence favorable to the defense, *Brady v. Maryland*, 373 U.S. 83 (1963), but that does not prevent a petitioner from pleading and proving that the prosecutor violated that duty. *See Strickler v. Greene*, 527 U.S. 263, 286-87 (1999).

The State fundamentally misunderstands the role of Martin's showing of inconsistency. This Court's vagueness jurisprudence stresses the importance of the *dual* goals of ensuring that "ordinary people can understand what conduct is prohibited" and discouraging "arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). For the same reasons California's promptness principle fails adequately to guide petitioners seeking to avoid default – *viz.* its indeterminacy, open-ended scope, and the opacity of decisions applying it – the principle fails to guide judicial discretion and, predictably, produces arbitrary and disparate outcomes. The State's real complaint is that showing similarly-situated petitioners receive disparate treatment is

not a showing that the law has been *violated*, but rather that the law has been *followed*. This Court's consistency review should not be abandoned to resolve the tension between the California Supreme Court's desire for indeterminacy, and the state Attorney General's desire to prevent merits review of constitutional claims.

2. *Beard v. Kindler* Does Not Establish that California's "Discretionary" Timeliness Framework is Adequate Nor that Consistency Is Irrelevant

The State finds much in *Beard*'s observation "a discretionary rule can be 'firmly established' and 'regularly followed' – even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." 130 S Ct. at 618 The State contends that decisions involving California's timeliness framework are no more "discretionary" than decisions by Pennsylvania courts whether to hear postconviction challenges from those who have escaped from custody

More fidelity to the facts and holding of *Beard*, and the authorities upon which *Beard* relies, show the ad hoc decision-making required by California's timeliness framework is inadequate. The discretionary decision not to *overlook* the objectively identifiable default-event that occurred in *Beard* – a decision that was guided by standards, fully explained, and subject to appellate court and federal

court scrutiny – is the polar opposite of a California court's "discretion" to make individualized claim-by-claim, ad hoc determinations regarding whether the bar should be applied in the first instance

a. *Beard* Involved a Discretionary Process of Reasoned Elaboration Regarding the Consequences of Violating a Clear, Objective Requirement of Submitting to the Court's Authority

Beard v Kindler involved claims for post-conviction relief that had been forfeited under the state law "fugitive waiver" doctrine. Kindler was convicted of capital murder, but escaped prior to sentencing. He was eventually returned for sentencing, and moved to reinstate motions that had been dismissed while he was on escape status. 130 S. Ct at 615-16.

The Pennsylvania Supreme Court affirmed the trial court's refusal to reinstate Kindler's motions in an opinion that included an eight-paragraph analysis of the lower court's decision to enforce the fugitive waiver *Commonwealth v Kindler*, 536 Pa. 228, 232-34, 639 A 2d 1, 2-4 (Pa. 1994). Kindler's application for state habeas relief was rejected on the ground that by escaping he had forfeited not only the right to pursue motions that were pending at the time, but motions that would otherwise have been properly filed upon his return as well That decision was affirmed, again in a detailed, reasoned decision

Commonwealth v. Kindler, 554 Pa. 513, 520-23, 722 A.2d 143, 146-48 (1999)

After the Third Circuit held the discretionary refusal to entertain Kindler's claims inadequate to bar review, this Court granted *certiorari* to "decide the following question: 'Is a state procedural rule automatically "inadequate" under the adequate-state-grounds doctrine – and therefore unenforceable on federal habeas corpus review – because the state rule is discretionary rather than mandatory?'" *Beard*, 130 S Ct. at 615. Kindler conceded that the answer was "no," and this Court consequently vacated the judgment of the Court of Appeals. *Ibid.* In particular, the Court stated:

> We hold that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review. Nothing inherent in such a rule renders it inadequate for purposes of the adequate state ground doctrine. To the contrary, a discretionary rule can be "firmly established" and "regularly followed" – even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others

Id. at 618 So uncontroversial was this conclusion that the Court cited only a single authority in support, D. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L Rev 1128, 1140 (1986) (*cited ibid* , with explanatory parenthetical "[R]efusals to exercise discretion do not form an important independent

category under the inadequate state ground doctrine")

b. The Discretionary Process of Reasoned Elaboration Does Not Include Standardless Ad Hoc Decision-Making

The reference to Professor Meltzer's article informs an understanding of the narrowness of the Court's holding as well as its reference to "appropriate exercise[s] of discretion." First, Meltzer's discussion was limited to cases like *Beard*, where the issue is "whether a state procedural ruling is inadequate simply because the state court possessed but did not exercise discretion to *excuse* the procedural default" 99 Harv. L Rev. at 1139-40 (emphasis added). Second, Meltzer notes that the "power of reasoned elaboration," *see* H. Hart & A. Sacks, *The Legal Process Basic Problems in the Making and Application of Law* 144 (W. Eskridge Jr. & P Frickey eds., 1994), which the inadequate state ground doctrine should not be used to obstruct, must be distinguished from the "wholly ad hoc" decision-making,[7] which, in the opinion of scholars, is not adequate to defeat federal

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[7] Hart & Sacks refer to such ad hoc decision-making as the "power of continuing discretion" in which the decision-maker has the authority to make decisions "without obligation to relate in any formally reasoned manner the grounds upon which he acts in one instance with those upon which he acts in another" *See* H Hart & A Sacks, *supra*, at 144

review. *See op cit* ; T Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 Sup. Ct. Rev. 187, 226 (1965); A Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 Colum L Rev. 1050, 1084 (1965) ("if a hearing has been denied to a constitutional claim because the state court determined, arbitrarily, that there was no compliance with a state procedural rule, it is inconceivable that the arbitrary action of the state court should be binding on the federal district court."). *See also Sullivan v Little Hunting Park, Inc.*, 396 U.S. 229, 243 (1969) (Harlan, J , dissenting) (suggesting that simple ad hoc exercises of power not to entertain federal questions would be inadequate to bar federal review, in contrast to "the kind of 'discretion' that is . . 'the judicial formulation of law,' [where] a court has an obligation to be reasonably consistent and 'to explain the decision, including the reason for according different treatment to the instant case'" (*citing* Sandalow, 1965 Sup. Ct. Rev. at 226))[8]

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[8] These notions of courts' discretion to elaborate can be traced back to Blackstone Throughout his discussion of the courts of equity, famous for their flexibility, Blackstone emphasized that even they must be governed by rules and precedents no less than the courts of law "If a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case, the inconvenience that would arise from this uncertainty, would be a worse evil than any hardship that could follow from rules too strict and inflexible" 3 W Blackstone, *Commentaries on the Laws of England* 440 (1768) Had their

(Continued on following page)

That *Beard* was about the "power of reasoned elaboration" in contrast to the power to decide arbitrarily, ad hoc, is clear not only in the Court's citation to Meltzer's discussion of the distinction, but also from Justice Kennedy's concurrence, in which he wrote:

> The process of elaborating, defining, and then shaping a State's decisional law after considering the competing arguments in a specific case rests on this premise: Novel facts and circumstances may disclose principles that, while consistent with the logic and rationality the law seeks and in that sense predictable, still have not yet been defined with precision in earlier cases This is the dynamic of the case system we rely upon to explain the law [¶] The adequate state ground doctrine ought not to foreclose the case process in the separate States.

Beard, 130 S. Ct. at 620 (Kennedy, J , concurring)

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discretion not been channeled, equity courts would have undermined the rule of law and produced arbitrary government "[The judiciary's] powers would have become too arbitrary to have been endured in a country like this, which boasts of being governed in all respects by law and not by will " *Ibid* (footnote omitted) To be properly deemed "discretionary" a court's choices must not be left to "inclination but to its judgment, and its judgment is to be guided by sound legal principles " *United States v Burr*, 25 F Cas 30, 35 (No 14,692d) (CC Va 1807) (Marshall, C J)

c. The Unexplained, Ad Hoc Decisions Required by California's Timeliness Framework Are Not Equivalent to the Discretion Pennsylvania Courts Possess to Overlook a Fugitive Waiver

The State is looking through the wrong end of the telescope when it equates the ad hoc decision-making involved in applying California's timeliness framework with the explicated, reasoned elaboration that went into the Pennsylvania court's decision whether to apply the fugitive waiver rule to bar prospective as well as pending claims for relief. The discretion whether, for equitable reasons, to forgive a clear default is entirely different from the "discretion" to determine *ex post facto* what conduct the rule requires for the petitioner's circumstances. The discretionary power of reasoned elaboration involved in *Beard* is the antithesis of the unexplained, silent, and good-for-this-case-only invocations of California's timeliness bars that epitomize the "power of continuing discretion."[9] This Court's holding that the discretionary rule in *Beard* was adequate to support the judgment does not entail a conclusion that California's unique ad hoc decision-making must be accepted

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[9] When a California court elects not to publish an explanation for its decision, it signifies that the decision cannot be viewed as a guide to the law's meaning or how it is to be applied in other cases. Cal. R. Ct. 8.1105(c) (listing factors to be considered when deciding whether to publish a decision).

as adequate regardless of the results it produces. In fact, *Beard*'s *ratio decidendi* establishes just the opposite.

CONCLUSION

The judgment in the Court of Appeals should be affirmed. The California Supreme Court's ambiguous reference to *In re Clark* and *In re Robbins*, if construed as a timeliness default is not broad enough to support the judgment. The state-courts' oft-repeated descriptions of the timeliness framework does not provide adequate notice of the time by which state habeas petitions must seek relief else suffer forfeiture of their claims. The ad hoc decision-making required by the timeliness framework does not reflect the type of discretionary judgments that were deemed adequate by *Beard*.

DATED: October 27, 2010

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AMICUS CURIAE BRIEF

No. 09-996

In The Supreme Court of the United States

JAMES WALKER, WARDEN, et al ,

Petitioners,

vs.

CHARLES W MARTIN,

Respondent

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE HABEAS CORPUS RESOURCE CENTER IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a state-court practice of determining the timeliness of habeas corpus petitions on a case-by-case basis, with no established rules or principles for deciding either when a petition is untimely or whether its untimeliness will be excused – a practice that has resulted in the inconsistent treatment of similarly situated habeas corpus petitioners – constitutes an "adequate" state procedural ground for extinguishing a federal constitutional claim.

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INTEREST OF *AMICUS CURIAE*[1]

The Habeas Corpus Resource Center ("HCRC") is an entity in the Judicial Branch of the State of California responsible for representing indigent California capital petitioners in state and federal habeas corpus proceedings. *See* Cal. Senate Bill 513 (Ch. 869, 1998 Cal. Stat.). Since 1999, the HCRC has accepted appointments by the California Supreme Court and the federal courts in ninety-six cases and has recruited and trained private counsel in capital habeas corpus proceedings and served as a resource to these attorneys In the capacity of providing direct representation and as a resource center, the HCRC has developed particular expertise in the habeas corpus issues currently before this Court and has an interest in ensuring that California habeas corpus petitioners are not deprived of federal review of potentially meritorious claims as a result of the State's invocation of a procedural bar that is neither clearly defined nor regularly applied.

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[1] Pursuant to United States Supreme Court Rule 37 3(a), this brief is accompanied by the written consent of the parties *Amicus Curiae* attests that no counsel for a party authored this brief in whole or in part and no counsel, party, or other individual or entity other than *Amicus Curiae* has made monetary contributions toward the preparation or submission of this brief

SUMMARY OF ARGUMENT

This Court requires that state procedural rules be firmly established and regularly applied before they constitute an adequate state ground that may preclude federal review of claims arising under the United States Constitution. *See, e.g., Beard v. Kindler*, ___ U.S. ___, 130 S. Ct. 612, 617-18 (2009). The Court's requirement of regular application of a state procedural rule is designed to prevent discrimination against federal interests, ensure even-handed protection of federal rights, and provide notice to petitioners of its terms and requirements. *See, e.g., Lee v. Kemna*, 534 U.S. 362, 388, 389 (2002) (Kennedy, J., dissenting); *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982). The Ninth Circuit Court of Appeals correctly inquired into the adequacy of California's timeliness bar pursuant to this requirement, and its ruling appropriately reflects the obligation of the federal courts to review constitutional claims of state prisoners in the context of a timeliness bar that has been deemed by justices of the California Supreme Court to be "indeterminate at [its] very core," *In re Robbins*, 18 Cal. 4th 770, 817 n.3, 959 P.2d 311 (1998) (Mosk, J., concurring), and so "amorphous" as to fail to provide any meaningful guidance to petitioners, *In re Gallego*, 18 Cal. 4th 825, 849, 959 P.2d 290 (1998) (Brown, J., concurring in part and dissenting in part).

California's timeliness rule is unlike any other state's rule because it fails to specify a starting date for the limitations period, lacks a definite filing deadline, and fails to provide any criteria for

determining what constitutes – or may excuse – "delay." Moreover, the vast majority of decisions imposing a timeliness bar or excusing delay in California are unpublished, unexplained summary orders that are unavailable to incarcerated petitioners. The indeterminate nature of the timeliness rule and the dearth of published opinions by the California Supreme Court and lower appellate courts demonstrating its application result in highly inconsistent imposition of the bar among similarly situated non-capital habeas petitioners, arbitrary discrimination against federal claims, and a rule that does not fairly apprise petitioners of its requirements.

An empirical analysis of the unpublished summary denials confirms that, in practice, application of California's timeliness bar results in "arbitrary and capricious decisions." *In re Sanders*, 21 Cal. 4th 697, 726, 981 P.2d 1038 (1999) (Mosk, J., concurring). A sample consisting of the 157 habeas corpus petitions the California Supreme Court denied on the same day as Mr. Martin's petition reveals that, controlling for various factors such as the length of delay, the type of claim raised, and the type of justification offered to explain any delay, there was no regular, even-handed application of the timeliness bar, and thus no principled way of distinguishing among many of the cases denied solely on the merits despite lengthy delays and those with similar or shorter delays that were denied as untimely.

The Ninth Circuit correctly determined that California's timeliness bar was inadequate to bar

federal review at the time it was applied to default Mr. Martin's constitutional claims. Because information about the application of the timeliness bar in the vast majority of California habeas cases is unavailable to petitioners, the ultimate burden of demonstrating its regular application properly is allocated to the State.

ARGUMENT

I. CALIFORNIA LAW DOES NOT APPRISE HABEAS CORPUS PETITIONERS OF WHAT CONSTITUTES IMPERMISSIBLE DELAY OR PROVIDE GUIDANCE TO PERMIT CONSISTENT APPLICATION OF THE STATE'S TIMELINESS BAR.

A state procedural rule is firmly established when a petitioner could "fairly be deemed to have been apprised of its existence." *NAACP v Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958) Regular application of a state rule serves to provide such notice to petitioners, as well as courts, while ensuring that state rulings "do not discriminate against federal rights." *Lee v Kemna*, 534 U.S. at 388 (Kennedy, J., dissenting); *see also Ford v. Georgia*, 498 U S. 411, 423 (1991) ("justified reliance upon prior decisions" or "a consistent pattern of procedures," may establish state procedural rules) (internal quotation omitted); *Murray v. Carrier*, 477 U.S 478, 512 & n.18 (1986)

(a federal court's discretion to deny relief on the basis of state procedural default is "[n]arrowly circumscribed, in conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law") (internal quotation omitted) California's timeliness bar in non-capital cases accomplishes neither of these critical functions.

California's timeliness bar is indeterminate, without specific triggering dates or ascertainable filing deadlines. Moreover, the California Supreme Court's decisions and its published policies addressing the timeliness bar do not provide even basic notice of timeliness requirements to prospective habeas corpus petitioners and reviewing courts. This wholly undefined approach to time limits for the filing of habeas corpus petitions is unlike any of the other forty-nine states.

A. California Law And Supreme Court Policies.

In 1949, the California Supreme Court stated, without further explanation, that its practice in reviewing habeas corpus petitions was "to require that one who belatedly presents a collateral attack . . explain the delay in raising the question." *In re Swain*, 34 Cal. 2d 300, 302, 209 P.2d 793 (1949) Subsequent case law established that "delay" was to be measured from the time a petitioner became aware of the grounds for relief. *See, e g , In re Wells*, 67 Cal.

2d 873, 875, 434 P2d 613 (1967). For claims filed after "substantial" delay, a petitioner was required to "point to particular circumstances to justify" that delay. *In re Stankewitz*, 40 Cal. 3d 391, 397 n.1, 708 P.2d 1260 (1985). Aside from these cases establishing minimal contours of the timeliness rule, the California Supreme Court has issued only a small number of opinions and failed to explain the parameters of the timeliness bar or provide meaningful guidance to potential petitioners or reviewing courts.[2]

In a News Release issued in June 1989, the California Supreme Court announced new "Policies" to guide the filing of habeas corpus petitions in capital cases, including a policy that created a presumption of timeliness for newer capital cases and expressly incorporated the existing "substantial delay" rule from prior case law *See* News Release 40 Supreme Court Policies Regarding Cases Arising From Judgments Of Death, Policy 3, Standard 1-1.1 (June 6, 1989), *available at* http://www.herc.ca.gov/walker.php (last visited Oct. 25, 2010). The Policies explained that a petitioner may "establish good cause [for the delay] by showing particular circumstances

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[2] *See, e.g., People v. Jackson*, 10 Cal. 3d 265, 268-69, 514 P.2d 1222 (1973), *In re Saunders*, 2 Cal. 3d 1033, 1040, 472 P.2d 921 (1970), *In re Huddleston*, 71 Cal. 2d 1031, 1034, 458 P.2d 507 (1969), *In re Streeter*, 66 Cal. 2d 47, 52, 423 P.2d 976 (1967), *In re Perez*, 65 Cal. 2d 224, 228, 418 P.2d 6 (1966)

sufficient to justify substantial delay" *Id* at Policy 3, Standard 1-2.[3] Because the presumption of timeliness applied only to capital petitioners and the "Policies" merely incorporated the existing substantial delay and good cause standards, they did nothing to clarify the timeliness bar for non-capital petitioners or remedy its inconsistent application up to that point. *See In re Clark*, 5 Cal. 4th 750, 802, 855 P.2d 729 (1993) (Mosk, J., concurring in part and dissenting in part) (noting that "[r]egularity and consistency" in the application of the timeliness rule "were not evident" prior to *Clark*).

Following the announcement of the "Policies," the court issued a handful of opinions in capital cases discussing the timeliness bar. In *In re Clark*, the California Supreme Court affirmed the timeliness standard enunciated in *Swain* and subsequent cases, adding that courts should consider whether newly developed facts could have been discovered earlier, rather than simply evaluating whether the facts were presented promptly following discovery. 5 Cal. 4th at 774-75, 779. Although it did not establish specific

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[3] In the original 1989 version of the Policies, the presumption of timeliness attached only to petitions filed within sixty days after the final due date for the direct appeal reply brief News Release 40 Supreme Court Policies Regarding Cases Arising From Judgments Of Death, Policy 3, Standard 1-1 1 (June 6, 1989) *See also* Supreme Court Policies Regarding Cases Arising From Judgments Of Death, Policy 3, *available at* http //www courtinfo ca gov/courts/supreme/aa02f pdf (last visited Oct 25, 2010)

triggering dates for calculating delay, the California Supreme Court noted generally that "[d]elay in seeking habeas corpus or other collateral relief has been measured from the time a petitioner becomes aware of the grounds on which he seeks relief. That time may be as early as the date of conviction." *Id.* at 765 n 5 (citations omitted).[4] Ultimately, however, nothing in the *Clark* decision addressed the lack of clarity in California's timeliness rule or the absence of guidelines to ensure its regular and consistent application, features of the rule that the court itself recognized as the pre-existing state of affairs. *Id.* at 763 (noting that "no clear guidelines have emerged in our past cases")

Subsequent California Supreme Court decisions similarly failed to clarify the meaning of "substantial delay" or demonstrate in practice how the timeliness rule should be applied. In *In re Robbins*, another capital case, the court purported to "describe in greater detail . . the basic analytical framework governing our timeliness determination" but then merely stated that facts to demonstrate timeliness must be pled with specificity and that, in capital cases at least, an ongoing investigation into potentially meritorious claims may establish good cause for substantial delay. 18 Cal 4th at 780. In a concurring opinion, Justice Mosk implicitly acknowledged the

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[4] *Clark* also announced exceptions to the timeliness rule in circumstances in which the petitioner alleges facts establishing a "fundamental miscarriage of justice." 5 Cal 4th at 797-98

absence of criteria for the application of the timeliness bar, observing that "[t]he procedural bar of untimeliness is indeterminate at [its] very core . . . Of course, its application to any given claim may yield varying results, as reasonable persons differ as to whether the claim in question has been presented without 'substantial delay' and, if not, whether 'good cause' exists for any such delay." *Id* at 817 n.3 (Mosk, J , concurring) (internal quotation omitted).

In *In re Gallego*, also a capital case, the California Supreme Court explained that one of the thirty-five claims raised in the petition was timely because the court previously had denied a request for funds to develop the claim. 18 Cal. 4th at 828-29. This ruling was largely inapplicable to non-capital petitioners, who do not receive funding for investigation.[5] In an opinion concurring in part and dissenting in part, Justice Brown observed in *Gallego* that California's timeliness standards were "impossibly amorphous" and found that the California Supreme Court's explanations in *Clark*, *Robbins*, and *Gallego* were "nebulous as well as riddled with exceptions requiring fact-specific analysis." *Id* at 849 (Brown, J., concurring in part and dissenting in part) After a

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[5] The California Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 2-2 1, authorizing limited funds for investigation by habeas counsel in death penalty cases, does not apply to non-capital habeas petitioners, and counsel representing a non-capital habeas petitioner is not obligated to conduct any investigation *See In re Clark*, 5 Cal 4th at 783 & 784 n 20

detailed examination of the decision in *Clark*, Justice Brown concluded that its "imprecise, circular, and tautological language does not define a 'clear' rule this court can 'consistently appl[y]' to create a 'well-established' standard. . Nor does it even provide guidance." *Id* at 850 (citation omitted).

Finally, in another capital case, *In re Sanders*, the California Supreme Court considered whether good cause to justify delay is established where "an attorney representing a capital defendant essentially abandons his client." 21 Cal. 4th at 701 A fractured court provided various reasons why it found the petition to be timely. In a dissenting opinion, the author of the *Clark* decision declared that *Sanders* "contradict[ed]" the court's timeliness rule. *Id* at 730 (Baxter, J., dissenting). In a concurring opinion, joined by Chief Justice George and one other justice, Justice Mosk concluded that "in spite of the best and most honest efforts," the result of the timeliness bar "is, and will continue to be arbitrary and capricious decisionmaking and arbitrary and capricious decisions." *Id* at 726 (Mosk, J , concurring).[6]

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[6] Perhaps in an effort to provide some contours to the "amorphous" terms of the timeliness rule, the California Supreme Court recently issued an Order to Show Cause in *In re Reno*, S124660, to address the application of multiple procedural bars, including the timeliness rule *See* http //appellatecases courtinfo ca gov/search/case/mainCaseScreen cfm?dist=0&doc_id =1856339&doc_no=S124660 (last visited Oct 25, 2010)

These four internally contradictory cases regarding the application of the timeliness bar in capital cases do not provide non-capital petitioners with even basic notice of what length of delay may be considered "substantial" or criteria for determining whether there is cause to excuse such delay. Not surprisingly, this lack of guidance from the California Supreme Court has resulted in the absence of published decisions by the California Courts of Appeal on the issue. As discussed in Section II, *infra*, the California Supreme Court's actual practice in applying the timeliness bar in unpublished summary denials further confirms that the undefined rule results in very inconsistent application of the procedural default.

This Court previously has recognized that California's indeterminate timeliness rule also makes it difficult for federal courts to determine when a habeas corpus petition is untimely according to California law. *See Evans v. Chavis*, 546 U.S 189, 198-99 (2006) ("[g]iven the uncertain scope of California's 'reasonable time' standard, it may not be easy for the Circuit to decide . . . whether the prisoners' state-court review petition was timely"); *Carey v. Saffold*, 536 U.S 214, 223 (2002) (stating that California's standard may make it more difficult for federal courts to determine when a review application comes too late) In order to alleviate this problem, this Court suggested that the California courts could clarify the scope of their standard or the California Legislature could impose more determinate time limits, "conforming California law in this respect with the law of most

other States." *Evans*, 546 U S. at 199-200. Thus far, neither the California Supreme Court nor the California Legislature has acted upon this Court's suggestion.

B. Other States' Requirements For Timely Filing Of Habeas Corpus Petitions.

California's timeliness rule for non-capital habeas corpus petitions is unlike that of the other forty-nine states and the District of Columbia, which either require a petitioner to file a post-conviction petition within a determinate time period or have no statute of limitation for post-conviction review. Notably, California also is the only state with a timeliness rule that has not been codified by statute or rule of court. Thirty-three states have, by statute or rule of court, fixed deadlines for filing for post-conviction relief in non-capital cases, while the remaining sixteen states and the District of Columbia have no such time limit The most common deadline requires the filing of a petition within one year of the date upon which a petitioner's conviction becomes final on direct review, a time limit found in thirteen states.[7] Four states

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[7] Ala R Crim Proc 32 2(c) (West 2010); Del Super Ct Crim R 61(i)(1) (West 2010), Idaho Code Ann § 19-4902(a) (West 2010), Kan Stat Ann § 60-1507(f)(1) (West 2010), 15 Me Rev Stat Ann § 2128(5) (West 2010), Mont Code Ann § 46-21-102(1) (West 2010), Nev Rev Stat Ann § 34 726(1) (West 2010), 42 Pa Cons Stat Ann § 9545(b)(1) (West 2010), S C Code Ann § 17-27-45(A) (2009); Tenn Code Ann § 40-30-102(a) (West 2010), Utah Stat Ann § 78B-9-107(1) (West 2010), Va Code

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allow a petition to be filed within two years of a final conviction[8] and another four states allow filing within three years of that date.[9] Twelve of the remaining states provide fixed time limits, varying from thirty days to ten years past a date certain.[10] Sixteen states and the District of Columbia have no time limit for seeking post-conviction relief.[11]

Ann § 8 01-654(A)(2) (West 2010), Wash Rev Code § 10 73 090(1) (West 2010)

[8] Fla R Crim Pro 3 850(b) (West 2010), La Code Crim Proc § 930 8(a) (West 2010), Minn Stat Ann § 590 01(4)(a) (West 2010), Or Rev Stat Ann § 138 510(3) (West 2010)

[9] Colo Rev Stats Ann § 16-5-402(1) (West 2010), Iowa Code Ann § 822 3 (West 2010); Ky R Crim Proc 11 42(10) (West 2010), Miss Code Ann § 99-39-5(2) (West 2010)

[10] Alaska Stat Ann § 12 72 020(a)(3)(A) (West 2010), 16 Ariz R Crim Pro 32 4(c)(2) (within sixty days of counsel being appointed), Ark R Crim Pro 37 2(c) (West 2010), Ga Code Ann § 9-14-42(c) (2010), 725 Ill Comp Stats Ann § 5/122-1(c) (West 2010), Md Code Ann , Crim Pro § 7-103(b) (West 2010), Mo S Ct R 29 15(b) (West 2010), N J R of Ct 7 10-2(b), Ohio Rev Code § 2953 21(A)(2) (West 2010), 22 Okla Stat Ann § 1089(D) (West 2010), Tex Code Crim Proc art 11 071(4)(a) (Vernon 2010), Wyo Stat Ann § 7-14-103(d) (West 2010)

[11] Conn Gen Stat Ann § 52-466 (West 2010), *see also Summerville v Warden*, 229 Conn 397, 426-27, 641 A 2d 1356 (1994); Haw R Penal Proc 40(a)(1) (West 2010), Ind R Proc for Post-Conviction Remedies 1(1) (West 2010), Mass R of Crim Proc 30 (West 2010), Mich Comp Laws Ann § 6 508 (West 2010), Neb Rev Stat Ann § 29-3001 (West 2010), N H Rev Stat Ann § 534 1 (West 2010), N M R Dist Ct 5-802 (West 2010), *People v Richetti*, 302 N Y 290, 298, 97 N E 2d 908 (1951), N C Gen Stat Ann § 15A-1415(a) (West 2010), N D Cent Code § 29-32 1-03(2) (2010), R I Gen Laws § 10-9 1-3 (2010), S D Codified Laws § 21-27-3 1 (2010), Vt Stat Ann tit

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Furthermore, in states in which the courts exercise discretion to grant or deny post-conviction petitions, the discretion lies in excusing delay after an express deadline has expired. For example, Kentucky courts may allow a petitioner to file a claim after the three-year limitation has passed if he or she exercised "due diligence" in presenting the claim.[12] Illinois courts may allow a petitioner to file beyond the state's three-year time limit if there is no "culpable negligence" in his or her delay.[13] The one-year time limit in Kansas may be extended by a court to prevent a "manifest injustice."[14] Colorado law provides that courts may excuse delay beyond the state's strict time limits if the petition shows "justifiable excuse or excusable neglect."[15]

Without a codified statute or rule of court to explain time limitations and clearly apprise petitioners of the requirements for timely filing, and in the absence of judicial construction or other published rulings exemplifying application, it is all the more likely that California's timeliness bar will be applied inconsistently and arbitrarily. *See, e.g., Missouri v. Jenkins*, 495 U.S. 33, 50 (1990) (recognizing risk that

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13 § 7131 (2010); Wash D C Code § 23-110 (2010); W Va Code Ann § 53-4A-1 (West 2010), Wis Stat Ann § 974 06 (West 2010)

[12] Ky R Crim Proc 11 42(10)(a), (b) (West 2010)

[13] 725 Ill Comp Stats Ann § 5/122-1(c) (West 2010)

[14] Kan Stat Ann § 60-1507(f)(1) (West 2010)

[15] Colo Rev Stats Ann § 16-5-402(2)(d) (West 2010)

reliance on unpublished procedural rules may result in disparate treatment of similar cases; stating that "published rules of procedure [give] parties fair warning" and "[r]egular adherence to published rules of procedure best promotes the principles of fairness, stability, and uniformity that those rules are designed to advance"); *NAACP v Alabama ex rel Flowers*, 377 U.S. 288, 295, 301 (1964) (holding state procedural ruling inadequate where the state court placed no reliance on existing rules of court and instead refused to entertain federal claims on the basis of state court decisions that addressed a different situation than the one at bar) Indeed, California's practice demonstrates just such inconsistent and arbitrary application of its amorphous timeliness default rule and further confirms that there is no "firmly established and regularly followed state practice" that is adequate to bar federal review. *James v Kentucky*, 466 U S 341, 348-49 (1984).

II. THE CALIFORNIA SUPREME COURT'S ACTUAL PRACTICE IN APPLYING THE STATE TIMELINESS BAR DOES NOT ESTABLISH CRITERIA FOR IDENTIFYING OR JUSTIFYING SUBSTANTIAL DELAY AND IS HIGHLY INCONSISTENT AMONG SIMILAR CASES.

A. *Amicus Curiae* Utilized a Reasonable Methodology To Assess The California Supreme Court's Actual Practice In Applying The Timeliness Bar.

In the absence of California Supreme Court decisions defining the terms of California's timeliness rule in non-capital cases, *Amicus Curiae* conducted a study to determine whether (1) the California Supreme Court's actual practice in deciding habeas corpus cases provided petitioners with notice as to which petitions would be deemed timely filed and which would not; and (2) California's timeliness bar was regularly applied at the time the California Supreme Court denied Mr. Martin's petition. *See, e.g.*, *Williams v. Georgia*, 349 U.S. 375, 383-84 (1955) (in determining that discretionary state procedural rule was not adequate to bar federal review, the Court analyzed state court practice and ruled that "[a] state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner") The study consisted of an empirical analysis of all habeas corpus cases that the California Supreme Court decided on September 11, 2002, the same day that

court denied Mr. Martin's state habeas corpus petition.[16]

To accomplish its review, *Amicus Curiae* first obtained from the California Supreme Court Clerk's Office a list of all orders in habeas corpus cases issued on September 11, 2002.[17] *Amicus Curiae* then requested the files for these cases from the court's archives and conducted an exhaustive analysis of the habeas corpus petitions and the court's resolution of the cases.[18] *Amicus Curiae*'s focus on California Supreme Court orders reflects its effort to minimize the inconsistency that would appear in a broader sample; by analyzing only California Supreme Court practice and excluding cases decided in the California Courts of Appeal and Superior Courts, *Amicus Curiae* limited its sample to cases decided by the same court

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[16] The court files for the cases analyzed in this study are available at http://www.herc.ca.gov/walker.php (last visited Oct. 25, 2010).

[17] The complete text of the orders is not available on Westlaw or Lexis and is not published on the court's website.

[18] Given this cumbersome process, few – if any – habeas petitioners would be able to review the California Supreme Court's actual decisions in other habeas cases to ascertain what constitutes "substantial delay" or what kind of justification may be required to excuse any delay. *See, e.g.*, *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950) (due process requires that notice "be of such nature as reasonably to convey the required information"); *see also Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (relying on the weight of published decisional law to determine how state procedural rules are regularly applied); *James v. Kentucky*, 466 U.S. at 346-48 (same).

personnel and staff that were involved in deciding Mr Martin's case.[19]

On September 11, 2002, the California Supreme Court issued orders in 157 habeas corpus cases, denying relief in all of the cases. *Amicus Curiae* first evaluated this sample to identify cases that had been decided on the merits compared to cases denied because of state procedural defaults Of the 157 cases, *Amicus Curiae* characterized ninety-five cases as denied on the merits and sixty-two cases as procedurally defaulted, whether untimely or with citations indicating other procedural bars. *See In re Robbins*, 18 Cal 4th at 814 n.34 (explaining the state supreme court's citation practice). Of the ninety-five merits cases, seven involved denials of a petition for review following the California Court of Appeal's denial of habeas relief[20] The remaining merits cases and sixty

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[19] This Court has emphasized that an adequacy inquiry must focus on the nature of state law and its application at the time of the procedural default *See Ford v Georgia*, 498 U S at 424, *see also Valerio v Crawford*, 306 F 3d 742, 776 (9th Cir 2002) (explaining that default occurs for purposes of assessing adequacy of a state procedural rule barring successive petitions at the time petitioner filed his first petition, not when the procedural bar was actually imposed) *Amicus Curiae*, however, is unable to determine when Mr Martin's purported default occurred because the California Supreme Court's order does not explain when Mr Martin should have filed his habeas corpus petition

[20] In California, the state supreme court, intermediate courts of appeal, and superior courts all have original habeas corpus jurisdiction Cal Const , art VI, § 10 Although a superior court order denying habeas corpus relief is non-appealable, a

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of the procedurally defaulted cases were resolved by "postcard" denials of original habeas petitions filed in the California Supreme Court between July 20, 2001, and August 19, 2002.[21] The ninety-five merits denials stated only that the "Petition for writ of habeas corpus is DENIED" and did not include any citation to case law. *See Harris v Super Ct*, 500 F.2d 1124, 1128 (9th Cir. 1974) (holding that California Supreme Court's denial of a habeas petition without opinion or citation to authority constitutes a decision on the merits). Two additional cases were dismissed with identical language as these merits cases, but because they were denied in the lower courts on procedural grounds and could be subject to the "look through" doctrine, they were included among the procedurally defaulted cases.[22]

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state prisoner may file a new habeas corpus petition in the court of appeal *See, e g , In re Reed*, 33 Cal 3d 914, 918 n 2, 663 P 2d 216 (1983), *overruled on other grounds by In re Alva*, 33 Cal 4th 254, 92 P 3d 311 (2004) If the court of appeal denies relief, the petitioner may seek review in the California Supreme Court by way of a petition for review, or may instead file an original habeas petition in the state supreme court Cal R Ct 28 (West 2002), *see also* Cal R Ct 8 500 (West 2010) (recodifying Cal R Ct 28), *Redd v McGrath*, 343 F 3d 1077, 1080 n 2 (9th Cir 2003)

[21] "Postcard" denials are unpublished, unexplained orders that may or may not contain citations to California Supreme Court case law *See Harris v Super Ct* , 500 F 2d 1124, 1127-28 (9th Cir 1974) (en banc)

[22] *In re Marvin McCarthy*, S104764, and *In re Danny Ray Cameron*, S107202, both had reasoned lower court opinions denying as untimely habeas claims identical to the ones raised in the California Supreme Court Pursuant to this Court's

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Amicus Curiae next evaluated the sixty-two procedurally defaulted cases to determine which involved a timeliness bar. Only twenty-two of these sixty-two cases indicated a timeliness bar by a citation to *In re Clark*, 5 Cal. 4th 750, 855 P.2d 729 (1993), and *In re Robbins*, 18 Cal. 4th 770, 780, 959 P.2d 311 (1998), or to *Robbins* only.[23] Mr. Martin's case was in this group, and the order denying his petition reads in its entirety: "Petition for writ of habeas corpus is DENIED. (See *In re Clark* (1993) 5 Cal. 4th 750; *In re Robbins* (1998) 18 Cal. 4th 770, 780.)." *See In re Charles Martin*, Case No. S105308, *available at* http://www.herc.ca.gov/walker.php (last visited Oct. 25, 2010). Although the court did not state that the timeliness bar was the basis for its denial in Mr.

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decision in *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991), requiring federal courts to "look through" to the "last reasoned decision" to ascertain the ground for the silent denial, *Amicus Curiae* included these among the cases as a denial on timeliness grounds despite the lack of any citation or explanation by the California Supreme Court.

[23] *In re Thomas Gene Mayfield*, S104162, *In re Dana Page*, S104400, *In re Kevin Johnson*, S104783, *In re Jose Francisco Reyes*, S104915, *In re Kenneth Glover*, S105198, *In re Marvin Jar Dominguez*, S105201, *In re Charles Martin*, S105308, *In re Walter Scherbovitsch*, S105356, *In re Lonnie P. Gray*, S105396, *In re Lori Bartz*, S105429, *In re Stanford Bryant*, S105477; *In re Douglas James*, S105531, *In re Juan A. Portillo*, S106238, *In re Derrick Moses*, S106433, *In re Gregory Whitson*, S106521, *In re Alfrederick Love*, S106541, *In re Terry Evans*, S106811, *In re Charles A. Banning*, S106871, *In re Damon Lamar Foster*, S106872, *In re Charles Fordjour*, S106926; *In re Willie Tyrone Cooper*, S107150, *In re Bruce Senator*, S107861.

Martin's case or the other twenty-one cases with citations to *Clark* and/or *Robbins*, *Amicus Curiae* assumes that the *Clark* and *Robbins* citations were intended to convey the court's determination that the petitions were untimely.

Of the remaining forty cases involving state procedural defaults, ten were denied with a citation to "*In re Clark*, 5 Cal. 4th 750," which also addresses a bar on successive petitions, or to *Clark* and other cases involving procedural bars other than timeliness.[24] The procedural histories of these ten cases indicate that the *Clark* citation likely signified an invocation of the bar against successive petitions; however, the citation provides no guidance as to which of *Clark*'s procedural bars the court intended to impose. Nonetheless, because a denial on timeliness grounds could not be ruled out in these cases, *Amicus Curiae* included these cases in the portion of the sample it identified as arguably untimely Combining these cases with the *Clark/Robbins* denials and the two "look through" cases resulted in a total of thirty-four cases involving the state timeliness bar.

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[24] *In re Jerry B Nutt*, S104926, *In re Merrick Jose Moore*, S104930, *In re Journey Rodriguez*, S105158, *In re Anthony Smith*, S105887, *In re Henry Holmes*, S106154, *In re Edward Thomas*, S107031, *In re Nigel Donovan Moore*, S107200, *In re Stafford Davis*, S107324, *In re Henry Holmes*, S106229, *In re Kevin Eley*, S107165

B. The California Supreme Court's Actual Practice In Applying The Timeliness Bar Demonstrates That The Bar Is Not Regularly Applied.

To assess whether the timeliness bar was regularly applied across the sample, *Amicus Curiae* first analyzed the length of time it took each of the 157 petitioners to raise their claims in the California Supreme Court or, if identical claims were raised in the Superior Court or the Court of Appeal, how long it took to first present the claims in a lower court. *See, e.g , Johnson v. Mississippi*, 486 U.S. at 587 (a state procedural rule must be "consistently or regularly applied" in similar cases before it is adequate to bar federal review). Because California's timeliness bar is indeterminate and does not begin to run from a specified date or point in the proceedings, an initial challenge in determining the amount of delay involved in each of the 157 cases was ascertaining the appropriate point from which to begin measuring delay

Under California's timeliness rules, "delay" is measured from the time a petitioner became aware of the grounds on which he or she seeks relief. *See In re Robbins*, 18 Cal. 4th at 780 ("Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim."). Thus, for challenges to a conviction or sentence discernable from the trial record, the starting point for measuring delay "may

be as early as the date of conviction" rather than the finality of the conviction *In re Clark*, 5 Cal. 4th at 782-83. The sample of 157 cases decided on September 11, 2002, however, provided no clue as to whether the California Supreme Court evaluated timeliness based on delay from finality of conviction, as *Amicus Curiae* Criminal Justice Legal Foundation asserts (*see* Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioners at 6), or from the date judgment was entered in the trial court or other possible trigger dates.

Because of this uncertainty in the timeliness rule, *Amicus Curiae* employed four different points from which to calculate periods of potential delay: (1) the finality of the conviction under California law;[25]

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[25] Finality of conviction was calculated using the following methodology

> 1 In cases where no appeal from the judgment of conviction was taken, the conviction was deemed final sixty days after the date of sentencing because that is when the time for filing a notice of appeal from the rendition of judgment expired *See* Cal R Ct 30 1 (West 2002), *see also* Cal R Ct 8 308 (West 2010)
>
> 2 In cases where an appeal to the intermediate appellate court was filed but review was not sought in the California Supreme Court, the conviction was deemed final forty days from the date the appellate opinion was filed While such a decision is final thirty days after it is issued, the earliest that the conviction may be deemed final is when the ten-day time period for filing a petition for review in the California Supreme Court expires *See* Cal R Ct 28 (West 2002), *see also* Cal R Ct 8 500 (West 2010)

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(2) the date of entry of judgment against petitioner in the trial court;[26] (3) the date that the alleged unlawful state action occurred that gave rise to a claim that was unrelated to the trial, such as a challenge to a parole decision or prison administrative action; and (4) the date of an intervening event when the claim alleged was based on newly discovered evidence or a change in the law applicable to the petitioner's case. *Amicus Curiae* then compared factors such as the length of delay generally, delay in the context of ineffective assistance of counsel claims (the type of claim defaulted in Mr. Martin's case), and delay in the context of justifications provided for the delay. Finally, *Amicus Curiae* reviewed other cases generally, those in the sample with different claims or delays than Mr Martin's, to determine whether the California Supreme Court applied the timeliness bar consistently in other types of cases.

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3 In cases where a petition for review was filed in the California Supreme Court, the conviction was considered final thirty days from the denial under California law If the California Supreme Court issued an order to show cause, the conviction became final thirty days after the Supreme Court's final review

4 In cases where the petitioner filed a petition for certiorari in the United States Supreme Court, the conviction was deemed final on the date the certiorari petition was denied

[26] Although entry of judgment in a criminal case is a separate procedural event from the imposition of sentence, *see* Cal R Ct 8 104(d), both events typically occur during the same proceeding, at the sentencing hearing, *see* Cal R Ct 4 310, 4 470, 4 472 *Amicus Curiae,* therefore, used the sentencing date provided in the habeas petition as the starting point for measuring delay from entry of judgment

Across all types of comparisons in the sample, *Amicus Curiae* could discern no principled way of distinguishing between habeas corpus cases that were denied as untimely and those that were denied on the merits. The court's orders instead reflect a highly inconsistent and seemingly arbitrary approach to imposition of California's timeliness bar. The results of *Amicus Curiae*'s comparisons are discussed in detail below, and also are reflected in the figures contained in the Appendix to this brief.

1. Comparison By Length Of Delay

Among the cases with delays of five to six years from finality of conviction – the length of delay in Mr Martin's case – sixty-two percent of the cases were denied on the merits and just thirty-eight percent, including Mr Martin's case, were denied as untimely. *See* Figure 2 at 2a. Furthermore, all of the merits cases within this range were filed after lengthier delay than Mr. Martin's.[27] Indeed, more than half of the petitions denied solely on the merits were delayed by one or more years *See* Figure 1 at 1a (showing forty-eight of eighty-seven cases denied on the merits with a delay greater than one year) [28]

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[27] *See In re John W Fraser*, S108723, *In re James Edward Cooper*, S104853, *In re Jesse Brien Brittain*, S105213, *In re Charles R Eagan*, S106439, *In re Forrest Lee Jones*, S106922, *In re Alexander Rasin*, S106775

[28] Figure 1 and Figure 2 include 145 of the 157 cases in the study Four merits cases were excluded from this subset of the

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A comparison of delay measured from the entry of judgment demonstrates similar irregularity.[29] Sixty-seven percent of cases delayed from five to six years and fifty percent of cases delayed between six and seven years nonetheless were denied on the merits. *See* Figure 4 at 4a. Measuring from entry of judgment, Mr. Martin's petition was delayed by approximately six and a half years;[30] however, in five cases with greater delays than Mr. Martin's, the California Supreme Court resolved the claims on the merits, without imposing a timeliness bar.[31] Overall,

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sample because no information was available regarding the direct appeal and *Amicus Curiae* therefore was unable to determine the date the conviction was final Another four merits cases were excluded from this subset because the petitioner filed the habeas corpus petition in the California Supreme Court before finality of conviction Two cases characterized by *Amicus Curiae* as untimely because they had a citation to *In re Clark* only were excluded because they also were filed before finality of conviction and could not have been considered delayed using finality as the starting measure Two cases denied on other procedural grounds were omitted either because they were filed before finality of conviction or no information was available to calculate finality of conviction

[29] In cases where only the date of conviction was available, *Amicus Curiae* used that date as the trigger date, with the assumption that conviction and entry of judgment generally occurred close in time

[30] Mr Martin filed his petition for habeas corpus relief 1,767 days after the judgment against him became final, and 2,373 days after he was sentenced

[31] *See In re James Edward Cooper*, S104853, *In re Jesse Brien Brittain*, S105213, *In re Phillip Joseph*, S105440, *In re Charles R Eagan*, S106439, and *In re Forrest Lee Jones*, S106922

sixty-nine of the seventy-four merits cases that could be included in this sample were delayed more than one year, and fourteen merits cases were delayed more than five years. *See* Figure 3 at 3a [32] Delay among the all merits denials in this sample ranged from eleven days to over nine years, compared to delays of one year to approximately fifteen years among cases characterized as untimely [33] *See id.*

A closer comparison of petitions also failed to reveal any meaningful bases for understanding different outcomes among similar cases. For example, in *In re James Edward Cooper*, S104853, the petitioner challenged his three-strikes sentence for petty theft based on intervening Ninth Circuit case law, but

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[32] Figures 3 and 4 include 129 of the 157 cases in the study Four merits cases were excluded from this subset of the sample because neither conviction nor sentencing dates were available Another seventeen merits cases were omitted from this subset because the habeas petitioners challenged state actions that occurred after the entry of judgment, for example, cases that challenged only parole board decisions Two cases denied with citations to *Clark* and/or *Robbins* were omitted from this subset because the sentencing date could not be determined Five cases denied on other procedural grounds were excluded from these figures because entry of judgment could not be calculated

[33] These numbers likely underrepresent the total number of delayed petitions denied solely on the merits As explained, in footnote 32, *supra*, twenty-one merits cases were excluded from this sample, some of which were substantially delayed Excluding these cases from the analysis thus underestimates the percentage of cases in which the California Supreme Court did not apply a timeliness bar despite substantial delay in the filing of a petition challenging the criminal judgment

also raised independent claims of ineffective assistance of trial and appellate counsel, neither of which relied upon the Ninth Circuit's recent decision. His delay was greater than five years from finality of conviction and six years from the entry of judgment, delay equivalent to that in Mr. Martin's case. Mr. Cooper attempted to justify his delay in presenting the Eighth Amendment claim by explaining that he only recently had become aware of law that supported his position, but provided no explanation for the long delay in raising the ineffective assistance of counsel claims Contrary to the disposition of Mr. Martin's case, however, the California Supreme Court reviewed Mr. Cooper's petition solely on the merits.

As the foregoing discussion and Figures demonstrate, no general conclusions may be reached about the maximum delay the California Supreme Court would countenance before imposing a timeliness bar.[34] The court's "ad hoc method" of applying the state procedural bar "is antithetical to the doctrinal consistency that is required" for state procedural grounds to preclude federal review of constitutional claims. *Michigan v Long*, 463 U S 1032, 1039 (1983).

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[34] These findings contradict *Amicus Curiae* Criminal Justice Legal Foundation's unsupported assertion that "there is no doubt five years after finality on direct review is untimely" (Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioners at 6)

2. Comparison Of Cases Raising Ineffective Assistance Of Counsel Claims

Of the sixty cases in the sample that raised claims of ineffective assistance of trial counsel, thirty-two were denied on the merits, twenty-two (including Mr. Martin's) were denied with a citation to *Clark* and/or *Robbins*, and six were denied on other procedural grounds. *See* Figure 5 at 5a.[35] Notably, in cases with similar delay to Mr. Martin's case, there were virtually equivalent numbers of cases denied on the merits as those denied as untimely *Id.* (in cases filed between five and six years after finality of conviction, two were decided on the merits and three were denied as untimely); Figure 6 at 6a (in cases with delay from five to six and seven to eight years from entry of judgment, the number of merits denials and timeliness denials were the same)[36]

These comparisons illustrate that not only has the California Supreme Court reviewed petitions raising similar claims on the merits with delays as

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[35] Figure 5 reflects only a total of fifty-seven cases because it omits one case, *In re Nemesio Plancarte*, S108210, for which the date of finality of conviction could not be determined and two additional cases, *In re Ronnie Winn*, S108062 and *In re Stanley E. Singleton*, S103819, in which the habeas corpus petition was filed prior to finality of conviction

[36] Figure 6 reflects a total of fifty-nine cases, twenty-one of which were denied with a timeliness citation. The figure omits one case that was denied with a citation to *Clark*, *In re Anthony Smith*, S105887, because the date of entry of judgment could not be determined

long as five or more years but also has denied petitions as untimely with much shorter delays, with no meaningful method of distinguishing between the two categories. For example, in *In re Thomas Turner*, S107309, the petitioner challenged his conviction for robbery and car-jacking based on ineffective assistance of trial counsel as well as other claims. His petition was delayed over two years from the time of finality of conviction and over four years from the entry of judgment. Like Mr. Martin, Mr. Turner generally asserted that his claims had been raised with due diligence, but, unlike in *In re Martin*, Mr. Turner's petition was denied on the merits. Similarly, in *In re Timothy A. Duke*, S106969, the petitioner challenged his conviction for murder and negligent discharge of a firearm on the grounds of ineffective assistance of trial and appellate counsel, among other claims. His petition was delayed almost four years from the finality of conviction and he provided no explanation for his delay, yet his petition was addressed on the merits.[37]

In *In re James Hardiman*, S105119, the petitioner challenged his conviction for inflicting corporal injury on a spouse on the grounds of ineffective assistance of trial counsel based on counsel's purported failure to object to the use of a prior conviction at sentencing. Although the petitioner attempted to justify his greater than three-year delay from the

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[37] The delay from the date of sentencing is not available.

entry of judgment, the justification failed to include any factual details as to why the delay occurred. Nonetheless, the California Supreme Court denied his petition solely on the merits. Comparing these cases to Mr. Martin's, no principled distinction or accurate prediction could be made as to whether a timeliness bar might apply to similar claims raised within a comparable period of delay.

3. Comparison By Type Of Justification Provided For Delay

When the September 11, 2002 cases are compared according to whether the petitioner provided a justification for any potential delay and if so, what type of justification was given, it is apparent that the justifications provided by petitioners whose petitions were denied as untimely were almost identical to those raised in petitions that were denied on the merits. *See* Figures 7 and 8 at 7a-8a.[38] Particularly surprising, however, is the fact that fewer of the petitioners whose claims were denied solely on the merits attempted to justify their delay at all, compared to petitioners whose claims were denied as

[38] Cases denied on other procedural grounds were not included in this comparison. Several petitioners from each group provided multiple justifications for their delay. Each justification was counted separately in allocating percentages to the types of justifications given, thus the total number of justifications given exceeds the number of petitions, and the Figures reflect distribution by percentage.

untimely. *Compare* Figure 7 at 7a (thirty-six percent of the merits cases did not provide a justification for delay or stated that their claims were being raised without delay) *with* Figure 8 at 8a (seventeen percent of the *Clark/Robbins* denial cases did not provide a justification for delay or stated that their claims were being raised without delay). Forty-two of the ninety-five petitioners whose claims were denied solely on the merits failed to provide justifications for potential delay Only seven of the thirty-four petitioners whose claims were denied as untimely failed to justify potential delay

Since petitioners were required to justify substantial delay and it was unknown what length of delay would be considered "substantial" by the California Supreme Court, the failure to provide justifications risked a denial as untimely in most of the cases in the sample. In practice, however, the failure to justify potential delay had little effect on the disposition of the case. Among those petitioners who failed to justify their delay but nevertheless received a merits review, the delays ranged from zero to almost six years Among the petitioners whose claims were arguably denied as untimely and who did not justify their delay, the delays ranged from zero to almost twelve years.

Among fourteen merits cases that were delayed more than five years from entry of judgment, seven raised claims based on the holding in *Andrade v. Att'y Gen* , 270 F.3d 743 (9th Cir 2001), *rev'd by Lockyer v Andrade,* 538 U S. 63 (2003), relating to California's

three-strikes law. In two of these cases, however, the petitioners also brought other claims raising errors relating to the trial that could have been raised much earlier (e.g., ineffective assistance of counsel), yet these claims were also denied solely on the merits.[39] In the other five merits denials in which filing was delayed more than five years from judgment and the petitioner claimed a later trigger date based on *Andrade*, the holding in *Andrade* clearly did not apply because that holding was strictly limited to specific facts.[40] *Andrade*, 270 F.3d at 767.

Moreover, the California Supreme Court did not consistently address petitions raising claims based on *Andrade*, negating any argument that the Court was following an internal policy of considering on the merits all claims allegedly based on new case law or challenging an excessive sentence. For example, in *In re Terry Evans*, S106811, the court denied a petition as untimely despite petitioner specifically citing the holding in *Andrade* as the reason for his delay in filing. In sum, a review of the justifications given by petitioners to explain their delay in raising habeas claims provided no clue as to what kind of

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[39] *In re James Edward Cooper*, S104853; *In re Jesse Brien Brittain*, S105213.

[40] *In re Forrest Lee Jones*, S106922; *In re Phillip Joseph*, S105440; *In re Richard Willey Huff*, S106014; *In re Charles R. Eagan*, S106439; *In re Jesse Perez*, S106583.

justification and how much specificity or proof was required to overcome delay.

4. Other Case Comparisons

In addition to the discrepancies between Mr. Martin's case and similarly situated petitioners whose claims were denied on the merits, the sample also showed discrepancies in the manner in which the California Supreme Court treated other cases with similar delays, claims, and justifications. For example, in *In re Danny Ray Cameron*, S107202, petitioner challenged his conviction on the basis of ineffective assistance of trial and appellate counsel, voluntariness of his plea, and due process and equal protection violations. His petition in the Superior Court raising identical claims was delayed more than a year from finality of conviction, and more than two years from sentencing. Mr. Cameron attempted to justify his delay by asserting that the California Department of Corrections deprived him of his trial transcripts and he was a layman at law. Despite the considerable delay and absence of proof to support his justification,[41] the California Supreme Court denied his claims on the merits. Similarly, in *In re Scott G. Mullins*, S107933, petitioner challenged his conviction for first degree murder on the basis of ineffective assistance of counsel. He delayed raising this claim in

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[41] *See People v Duvall*, 9 Cal 4th 464, 486, 886 P2d 1252 (1995), *In re Clark*, 5 Cal 4th at 765

the Court of Appeal for more than a year from finality of conviction and more than three years from the entry of judgment, but failed to provide any justification for this delay. Nonetheless, the California Supreme Court denied his petition on the merits.

In contrast to these cases reviewed on the merits, in *In re Bruce Senator*, S107861, the California Supreme Court denied as untimely a petition challenging petitioner's sentence and the voluntariness of his plea,[42] despite a period of delay comparable to the cases just described (over one year from the finality of his conviction and over three years from the entry of judgment), and petitioner's attempts to explain the delay based on prison-related impediments and other grounds Similarly, in *In re Alfrederick Love*, S106541, petitioner challenged his conviction for attempted burglary and his sentence enhancements under California's three-strikes law, alleging ineffective assistance of counsel and other claims. His petition was delayed over a year from finality of conviction.

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[42] Mr Senator's case is a further illustration of the California Supreme Court's haphazard application of the timeliness bar Mr Senator submitted two petitions to the California Supreme Court, and both were denied on September 11, 2002 His first petition, *In re Bruce Senator*, S107861, referenced above, was denied on timeliness grounds His second petition, *In re Bruce Senator*, S109129, was filed approximately two months later and raised substantially similar claims As justifications for delay in both petitions, Mr Senator pointed to adverse prison conditions Inexplicably, Mr Senator's second, later petition was not barred as untimely, but appears to have been denied for failure to exhaust administrative remedies

Despite the comparable delay and attempts to justify the delay, the California Supreme Court denied his habeas petition as untimely

These cases cannot be reconciled and provide no guidance as to the court's criteria for imposing the timeliness bar. Furthermore, the habeas pleadings in the sample reflect the uncertainty that petitioners experience when pleading the timeliness of state habeas corpus petitions In attempting to justify his delay, the petitioner in *In re Alan Oleous Barnes*, S104887, complained that "there are no statutory or other specific time limits for filing a writ of habeas corpus in California Courts " His case was denied in the Superior Court on the basis of untimeliness and for failure adequately to explain delay. Addressing identical claims, the Court of Appeal issued a reasoned opinion citing procedural defaults other than untimeliness, and reached a claim of ineffective assistance of counsel on the merits, while the California Supreme Court denied the petition without any citations, leaving the petitioner entirely without guidance as to whether his petition was delayed or not.

CONCLUSION

The California timeliness rule fails to apprise petitioners of its requirements and is not regularly applied, contrary to this Court's requirement that a state procedural rule be firmly established and

regularly followed. The decision of the Court of Appeals for the Ninth Circuit should be affirmed.

October 2010

Respectfully submitted,

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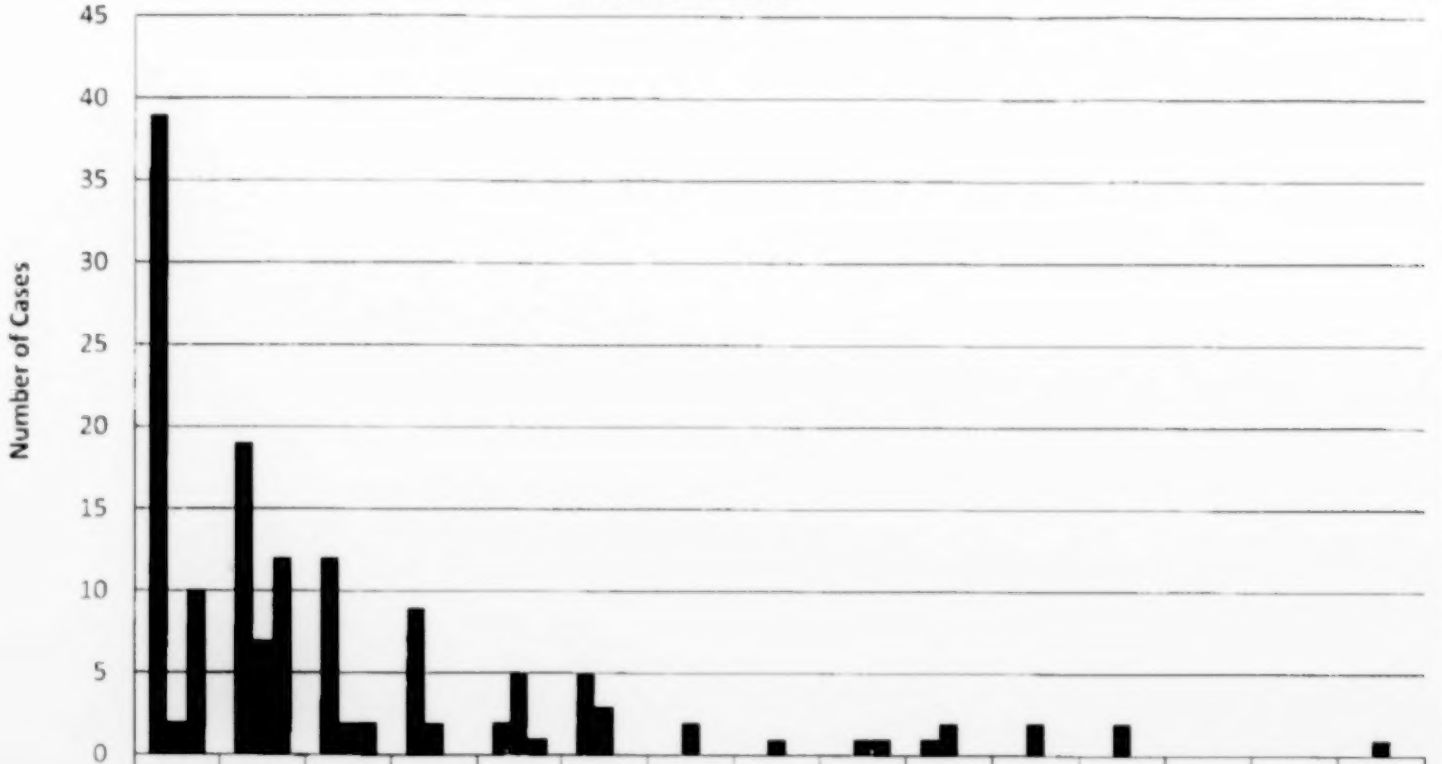
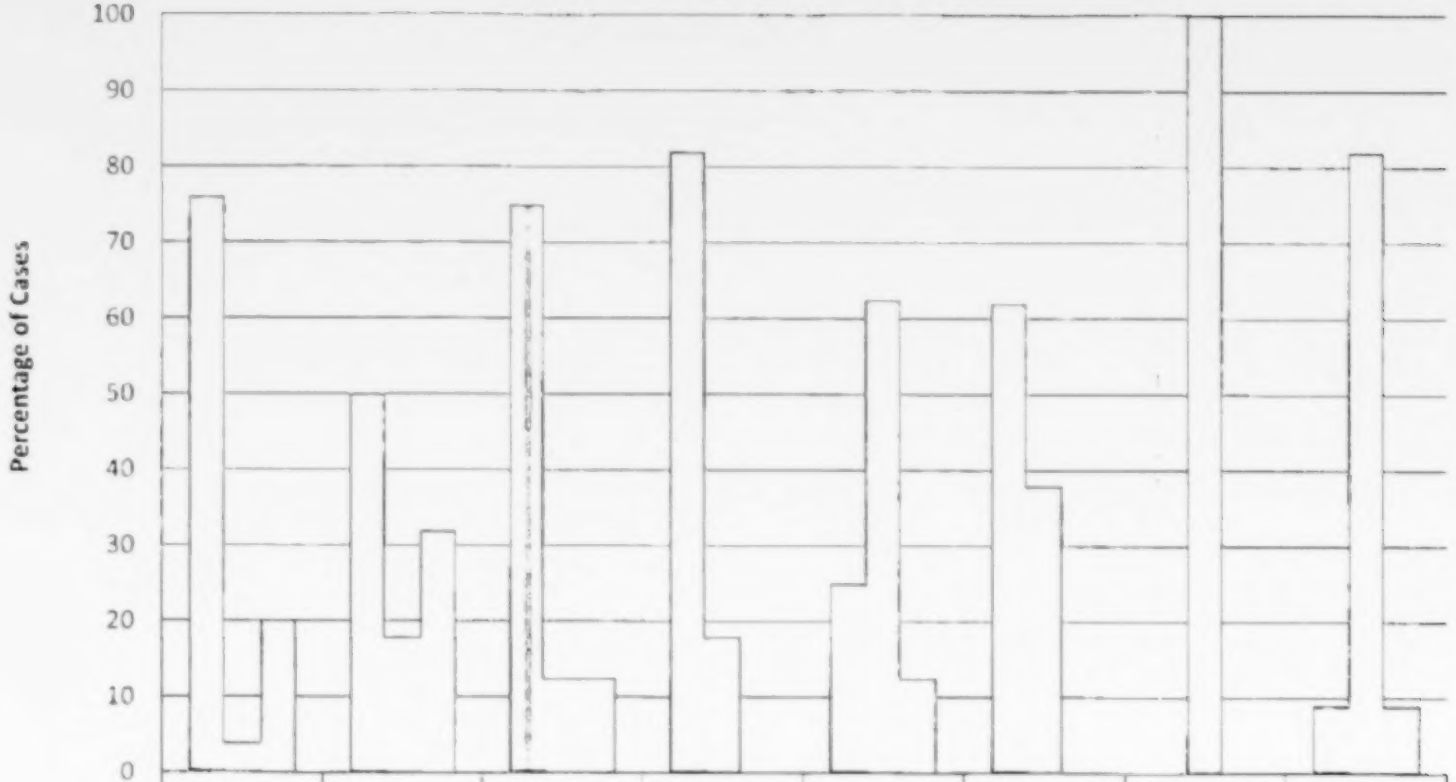
Figure 1. Length of Delay and Outcomes by Year from Finality Of Conviction

Number Of Cases



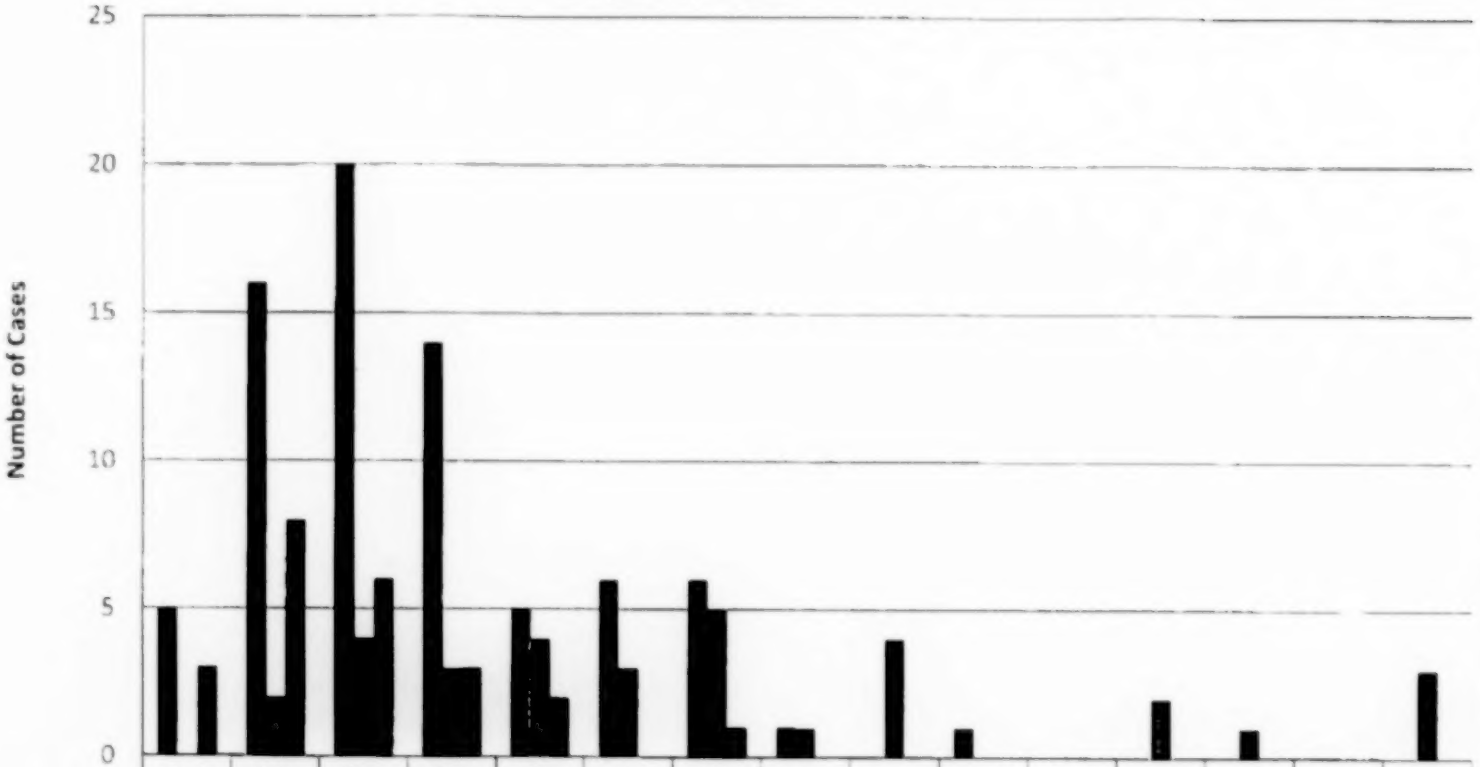
	0-1 year	1-2 years	2-3 years	3-4 years	4-5 years	5-6 years	6-7 years	7-8 years	8-9 years	9-10 years	10-11 years	11-12 years	12-13 years	13-14 years	14-15 years
# Merits Denials	39	19	12	9	2	5	0	0	0	1	0	0	0	0	0
# Clark/Robbins Denials	2	7	2	2	5	3	2	1	1	2	2	2	0	0	1
# Other Procedural Denials	10	12	2	0	1	0	0	0	1	0	0	0	0	0	0

Figure 2. Length of Delay and Outcomes by Year from Finality of Conviction



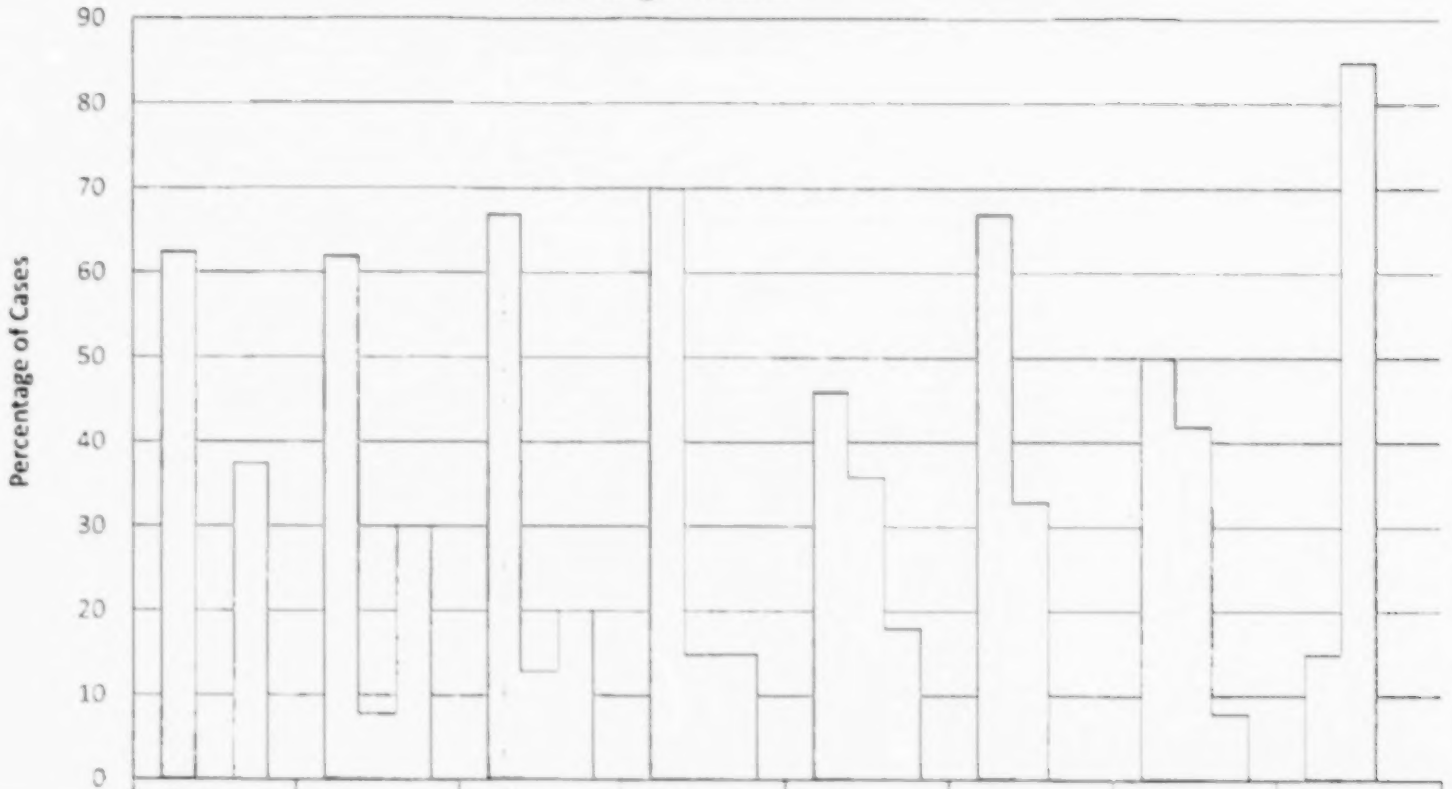
	0- 1 year	1-2 years	2-3 years	3-4 years	4-5 years	5-6 years	6-7 years	7-15 years
% Merits Denials	76	50	75	82	25	62	0	9
% Clark/Robbins Denials	4	18	12.5	18	62 5	38	100	82
% Other Procedural Denials	20	32	12.5	0	12 5	0	0	9

Figure 3. Length of Delay and Outcomes by Year from Entry of Judgment



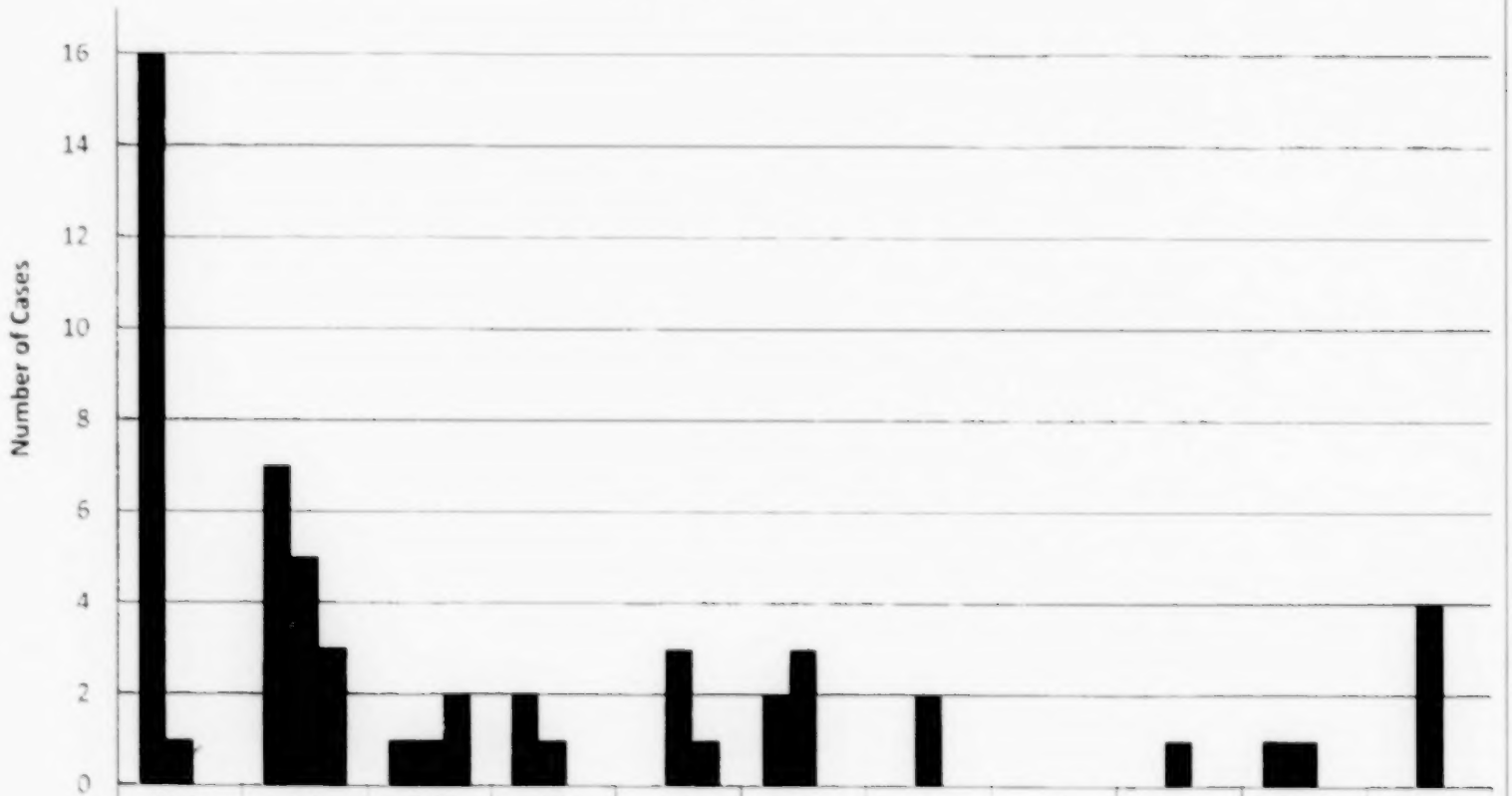
	0-1 year	1-2 years	2-3 years	3-4 years	4-5 years	5-6 years	6-7 years	7-8 years	8-9 years	9-10 years	10-11 years	11-12 years	12-13 years	13-14 years	14-17 years
# Merits Denials	5	16	20	14	5	6	6	1	0	1	0	0	0	0	0
# Clark/Robbins Denials	0	2	4	3	4	3	5	1	4	0	0	2	1	0	3
# Other Procedural Denials	3	8	6	3	2	0	1	0	0	0	0	0	0	0	0

Figure 4. Length of Delay and Outcomes by Year from Entry of Judgment



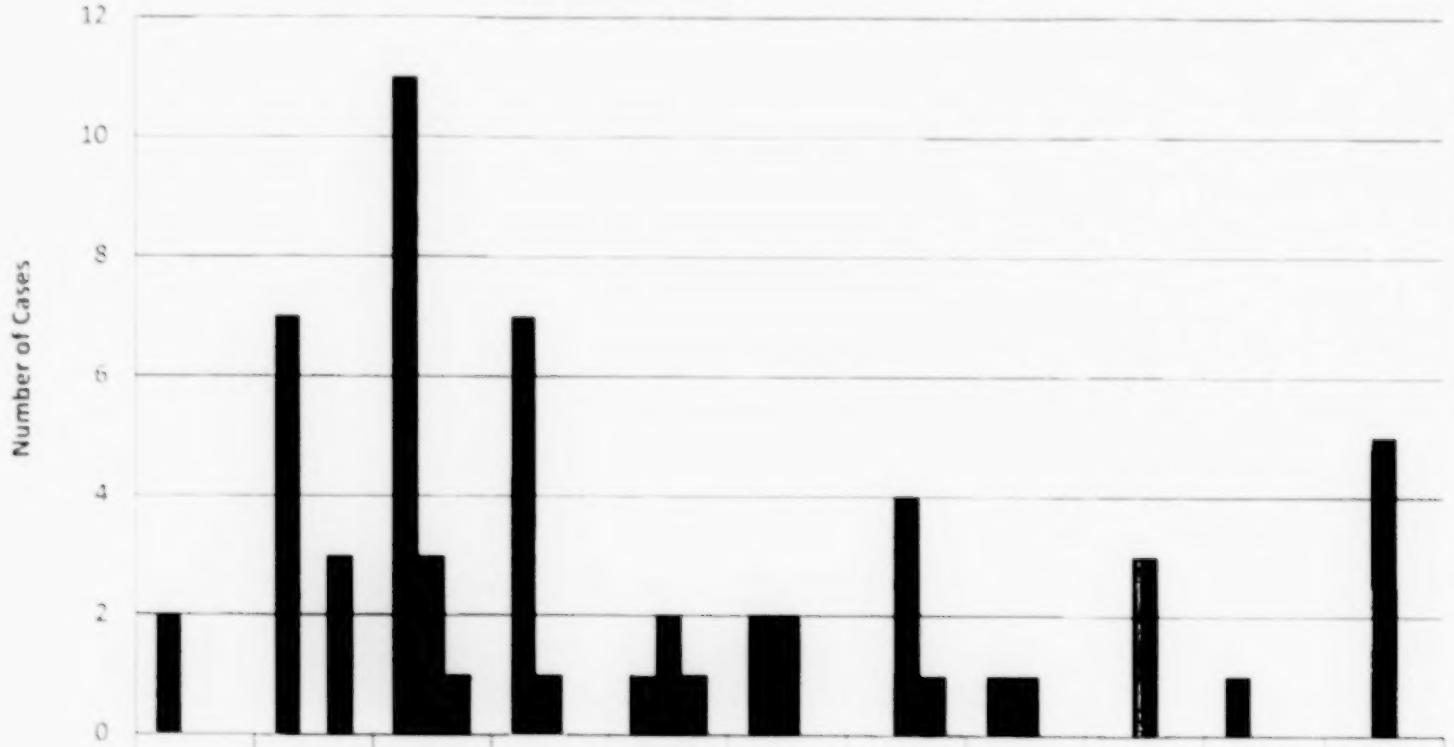
	0- 1 year	1-2 years	2-3 years	3-4 years	4-5 years	5-6 years	6-7 years	7-17 years
% Merits Denials	62.5	62	67	70	46	67	50	15
% Clark/Robbins Denials	0	8	13	15	36	33	42	85
% Other Procedural Denials	37.5	30	20	15	18	0	8	0

Figure 5. Petitions Raising Ineffective Assitance of Counsel Claims: Length of Delay and Outcomes from Finality of Conviction Number of Cases



	0-1 year	1-2 years	2-3 years	3-4 years	4-5 years	5-6 years	6-7 years	7-8 years	8-9 years	9-10 years	10-15 years
# Merits Denials	16	7	1	2	0	2	0	0	0	1	0
# Clark/Robbins Denials	1	5	1	1	3	3	2	0	1	1	4
# Other Procedural Denials	0	3	2	0	1	0	0	0	0	0	0

Figure 6. Petitions Raising Ineffective Assistance of Counsel Claims: Length of Delay and Outcomes by Year from Entry of Judgment Number of Cases



	0- 1 year	1-2 years	2-3 years	3-4 years	4-5 years	5-6 years	6-7 years	7-8 years	8-9 years	9-10 years	10-15 years
# Merits Denials	2	7	11	7	1	2	0	1	0	1	0
# Clark/Robbins Denials	0	0	3	1	2	2	4	1	3	0	5
# Other Procedural Denials	0	3	1	0	1	0	1	0	0	0	0

Figure 7. Justifications for Delay in Merits Denials

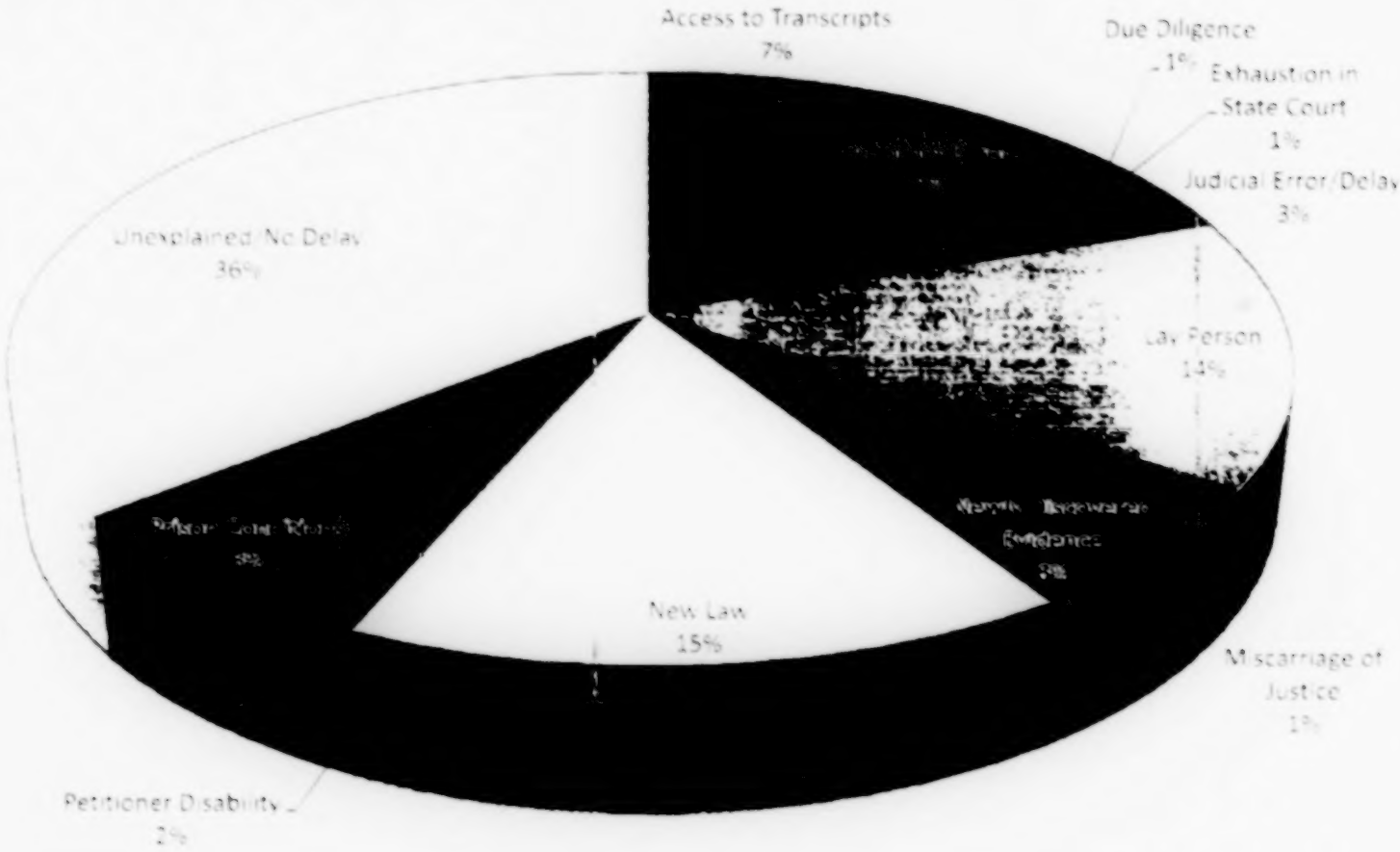
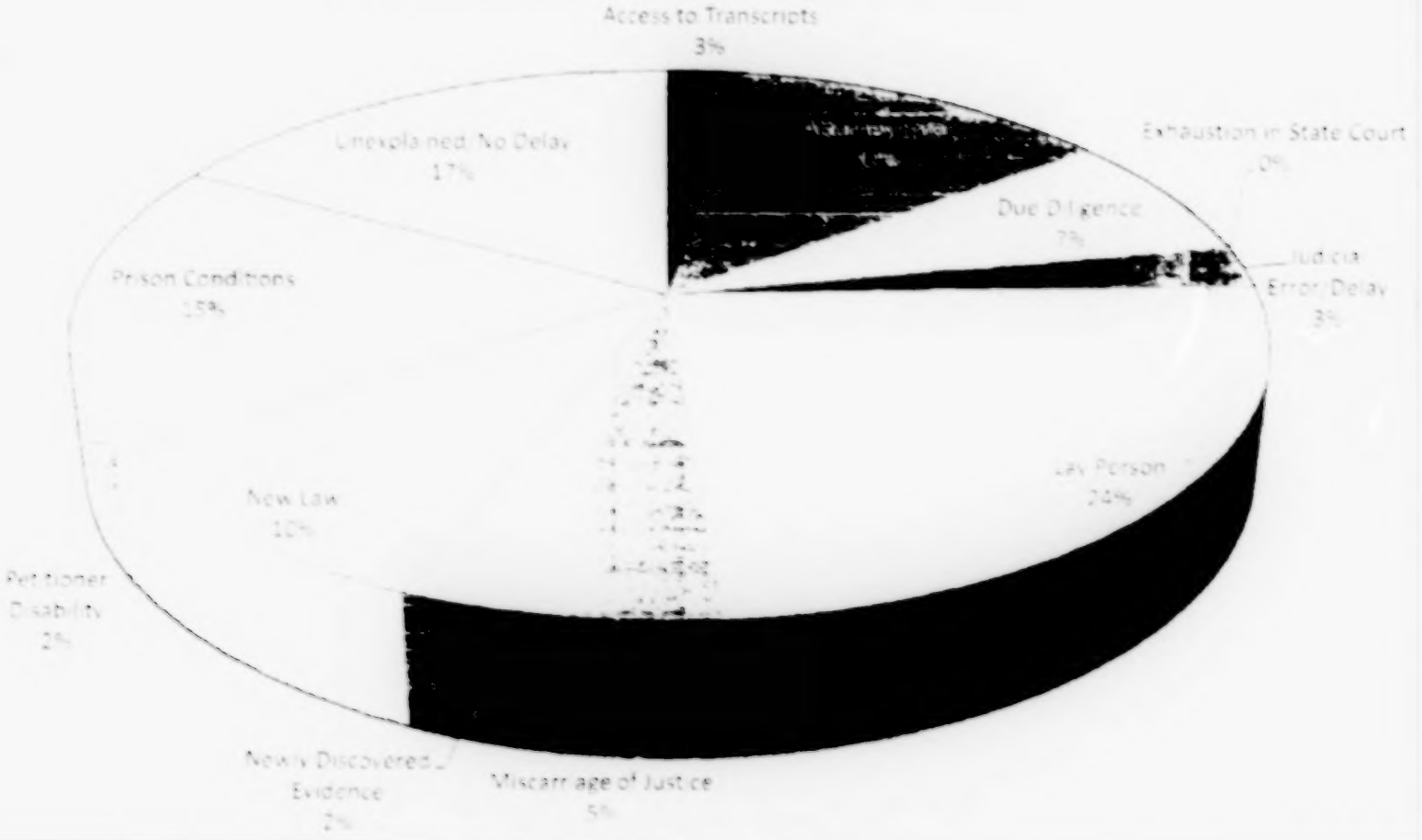


Figure 8. Justifications for Delay in *Clark/Robbins* Denials



AMICUS CURIAE BRIEF

No. 09-996

In the Supreme Court of the United States

JAMES WALKER, WARDEN, ET AL.,
Petitioners,

v.

CHARLES W. MARTIN,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR CORY R. MAPLES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* (5th ed. 2005) 15

INTEREST OF *AMICUS CURIAE*

Amicus Cory R. Maples is a death-row inmate incarcerated by the State of Alabama.[1] He has been denied any federal habeas review on the merits of serious constitutional claims challenging the validity of his conviction and sentence on the ground that he procedurally defaulted on those claims by failing to file a timely appeal of the denial of his state petition for post-conviction relief. Maples has a direct interest in the question presented in this case (No. 09-996) because, in upholding the denial of his federal habeas petition, the U.S. Court of Appeals for the Eleventh Circuit divided over whether the alleged default was based on an adequate state law rule. Maples has filed a petition for certiorari (No. 10-63) seeking review of the Eleventh Circuit's divided ruling, and the Court's articulation of the adequacy inquiry in this case may directly impact his case and others like it. Maples's own case also illustrates the different contexts in which adequacy issues arise and underscores that the adequacy doctrine is needed to ensure that inmates are not denied federal habeas review on the basis of state rules interpreted or applied in an arbitrary manner.

The adequacy issue in Maples's case centers on a state procedural rule that by its terms authorizes petitioners to seek relief when "[t]he petitioner failed to appeal within the prescribed time and that failure

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* or his counsel made a monetary contribution intended to fund the preparation and submission of this brief. Counsel of record for all parties have consented to the filing of this brief. The letters of consent have been submitted to the Clerk with this filing.

was without fault on the petitioner's part." Ala. R. Crim P. 32.1(f) (1990) Maples missed the deadline for the appeal of the denial of his post-conviction petition due to an extraordinary series of events that indisputably were *not* his fault, 10-63 Pet.6-7, and sought to proceed with an out-of-time appeal. At the time he sought that relief, Alabama courts had granted out-of-time appeals in directly analogous circumstances and, indeed, had done so on "indistinguishable facts," 10-63 Pet.App.30a (dissent). Nevertheless, Alabama's courts deemed Maples's claims procedurally forfeited. Maples then filed a petition for federal habeas corpus relief, asserting the constitutional claims that had been found defaulted by the Alabama courts. The U.S. District Court for the Northern District of Alabama concluded that the purported default rule was adequate to preclude federal habeas review of Maples's constitutional claims, and a divided 2-1 panel of the Eleventh Circuit affirmed. 10-63 Pet.App.1a-32a

The Eleventh Circuit majority's adequacy analysis in *Maples* was deeply flawed in several respects that help to illustrate some of the problems with California's narrow conception of the adequacy requirement in this case. First, the court concluded that the alleged default rule was "firmly established and regularly followed" to *deny* relief, 10-63 Pet.App.12a, even though Alabama courts had *granted* relief in directly analogous cases, 10-63 Pet.13-17. Second, in reaching that counter-intuitive conclusion, the Eleventh Circuit engaged in a *post hoc* analysis to reconcile Alabama's cases in "retrospect," *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 457 (1958), which this Court rejected as improper long ago, *see id.*, and which resulted in the court's creation of an elaborate

tripartite framework based on distinctions that the Alabama courts themselves have never drawn. 10-63 Pet.17-18. Third, in undertaking that revisionist approach, the Eleventh Circuit relied on several Alabama decisions issued *after* the default in Maples's case. 10-63 Pet.16-17, 20-21. Finally, the court placed the burden on Maples to establish that the default rule was *inadequate*, rather than the burden on the state to show that the rule was adequate. 10-63 Pet.19.

As explained below, there are several potentially important distinctions between this case and *Maples*, including the fact that the default rule at issue in this case—unlike the one in *Maples*—arguably is entirely discretionary. *See generally* 10-63 Brief for the National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner (comparing the two cases). Nevertheless, especially if this Court entertains the broad-brush arguments raised by petitioners and their amicus in this case to eliminate or scale back the adequacy doctrine, the Court's decision in this case may directly impact the adequacy question in *Maples* and many other cases. Moreover, *Maples* underscores the importance of preserving the adequacy doctrine to ensure that inmates are not improperly denied federal habeas review of constitutional claims based on arbitrary or novel state procedural rules. Amicus Maples therefore has a substantial interest in this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns whether a case-made, state procedural rule requiring inmates to comply with a discretionary timeliness standard for seeking state post-conviction relief—which calls for inmates to file

habeas claims without "substantial delay" and has been subject to haphazard, inconsistent, and unexplained application by the California courts—is nevertheless adequate to bar federal habeas. Petitioners and their amicus invite this Court to rework its longstanding adequacy doctrine, Pet.Br.9, or do away with it altogether, Brief for Criminal Justice Legal Foundation in Support of Petitioners ("CJLF.Br.") 28. These far-reaching proposals are unnecessary to decide this case, but they are based on a misguided conception of the importance and scope of adequacy doctrine and reflect a cavalier regard for existing precedent. Indeed, petitioners and their amicus invite this Court to depart from or overturn its prior decisions without even attempting to show that the customary *stare decisis* factors for overturning precedent are met.

Although petitioners maintain that "there might not be a compelling need in the habeas corpus context for adequacy scrutiny," Pet.Br.24, this Court reaffirmed just last year that federal courts "have an independent *duty* to scrutinize the application of state rules that bar [their] review of federal claims." *Cone v. Bell*, 129 S. Ct. 1769, 1782 (2009) (emphasis added). This "independent duty" follows from, and furthers, the vital purposes served by federal habeas review of state convictions and sentences, by which "Congress sought to 'interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action.'" *Reed v. Ross*, 468 U.S. 1, 10 (1984) (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

In light of this well-settled duty, petitioners' attempt to reduce the scope of adequacy analysis to whether a state gave "fair notice of the rule," Pet.Br.9,

is misguided. Indeed, as petitioners themselves admit, under their conception of the doctrine "'inconsistent' application in the state's enforcement of its procedural rule[s] ... is immaterial to 'adequacy.'" Pet.Br.25 (capitalization omitted). But this Court long ago made held that "[s]tate courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Hathorn v Lovorn*, 457 U.S 255, 263 (1982). Instead, this Court has repeatedly insisted that state procedural rules must be "firmly established and regularly followed" in order to be adequate as a matter of federal law. *Beard v Kindler*, 130 S. Ct. 612, 617 (2009) (citation omitted).

This case should be resolved based on settled adequacy principles. As respondent explains, the state's timeliness rule "operates far outside the mainstream." Resp Br.57. The state not only has failed to show any coherent, much less consistent, standards guiding the exercise of discretion, it has repeatedly rejected invitations from this Court and other courts to clarify "the uncertain scope" of its standard. *Evans v. Chavis*, 546 U.S. 189, 199 (2006). This Court has held that there is nothing inherently problematic with discretionary rules. But even discretion can be abused. And discretionary or not, incoherent and arbitrarily applied rules like the one at issue in this case fail this Court's settled requirement that a rule must be "firmly established and regularly followed" to provide an adequate basis for precluding federal review, and offer no meaningful notice to individuals seeking post-conviction relief.

Even if this Court were inclined to tolerate greater uncertainty or arbitrariness in the application of overtly discretionary procedural rules, that would

not—as petitioners and their amicus wrongly argue—suggest a broader need to abandon or reformulate the adequacy doctrine. The facially discretionary rule at issue in this case is relatively uncommon, and Maples's case underscores the importance of the longstanding considerations animating adequacy doctrine, as well as the breadth of situations in which adequacy issues arise. Unlike this case, Maples's case involves a state's arbitrary and unduly burdensome application of a state rule that—without discretion—authorizes relief when a failure to appeal was not the petitioner's fault. At the time of the alleged default in Maples's case, the state courts had previously granted out-of-time appeals on "indistinguishable facts." 10-63 Pet.App.28a-30a (dissent). In nevertheless finding that this rule was adequate to *deny* federal habeas review, the Eleventh Circuit majority sought to reconcile the state rule by relying on cases decided *after* Maples's claims were deemed defaulted, and by purporting to glean granular distinctions in state law "in retrospect," *Patterson*, 357 U.S. at 457, resulting in the Eleventh Circuit's creation of an elaborate tripartite framework that has never before been recognized by any Alabama court.

Maples's case both illustrates the ongoing need for a robust adequacy doctrine that protects against the arbitrary application of state law to defeat federal rights, as well as the serious drawbacks of petitioners' proposal to water down the adequacy inquiry or, indeed, "scrap" it altogether in favor of a "cause and prejudice" standard (CJLF.Br. in Support of Certiorari 15), which was designed to address other matters than assuring the adequacy of the state law on which a purported bar to addressing federal rights is based.

ARGUMENT

I. THE ADEQUACY DOCTRINE IS DEEPLY GROUNDED IN THIS COURT'S PRECEDENTS AND SERVES VITALLY IMPORTANT PURPOSES

This Court has time and again held that "[t]he writ of habeas corpus plays a vital role in protecting constitutional rights." *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). Almost 150 years ago, Congress granted federal courts the authority to issue the writ of habeas corpus to state prisoners "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of February 5, 1867, ch. 28, 14 Stat. 385. "There can be no doubt that in enacting [what is today 28 U.S.C.] § 2254, Congress sought to 'interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action.'" *Reed v. Ross*, 468 U.S. 1, 10 (1984) (quoting *Mitchum v. Foster*, 407 U.S 225, 242 (1972)) The adequacy doctrine plays a vital role in ensuring that individuals like amicus are not deprived of federal court review on habeas of serious—and, indeed, meritorious—constitutional claims on the basis of novel or arbitrary state rules.

A. The Adequacy Doctrine Is Entrenched In This Court's Precedents

Because the Great Writ is a "bulwark against convictions that violate 'fundamental fairness,'" *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (citation omitted), this Court has limited access to federal habeas review because of state procedural defaults with caution and care. Both the state and its amicus criticize this

Court's precedents as presenting a "confused jumble of varying rubrics." CJLF.Br.5; *see* Pet.Br.18. There certainly is confusion at the margins and some lower courts have failed properly to heed this Court's teachings in undertaking the adequacy analysis. *See* 10-63 Pet 12-20. But going back at least to Justice Holmes's colorful reference to "springes," this Court has recognized that state law may not be arbitrarily invoked or sprung on inmates to defeat federal rights. *See Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.), discussed *infra* at 14. And for many decades this Court's precedents have established several clear principles governing when a state law rule is adequate.

Perhaps foremost among these principles, the Court has long recognized that only a "'firmly established and regularly followed' state rule[] ... will be adequate to foreclose review of a federal claim." *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (citation omitted); *see also James v. Kentucky*, 466 U.S. 341, 348 (1984); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); Pet.Br.21. As this Court has explained, the "firmly established and regularly followed" standard states two distinct, but complementary requirements, both of which must be satisfied in order for a state procedural rule to bar federal review. *See, e.g., Ford v. Georgia*, 498 U.S. 411, 425 (1991). The "firmly established" requirement tests whether litigants and federal courts are on notice of its contours. And the "regularly followed" requirement tests whether a rule is being applied unpredictably, inconsistently, or surprisingly—all of which implicate the concern that litigants with potentially meritorious federal claims will be arbitrarily barred from federal court and that asserted rules are being used as a pretext to deny federal rights.

Last term, this Court reached the "uncontroversial" conclusion that "a discretionary rule can be 'firmly established' and 'regularly followed'—even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Beard v. Kindler*, 130 S. Ct. 612, 618 (2009) The Court explained that a contrary conclusion could discourage states from adopting rules that "grant[] courts discretion to excuse procedural errors." *Id.* But the Court by no means held that *all* discretionary rules were adequate. Nor did it in any way suggest that the "firmly established and regularly followed" requirement was inapplicable to discretionary rules, much less hold that it did not apply with full force to the many state law rules that are *not* discretionary or are non-discretionary in relevant part.[2]

This Court has also recognized that state procedural requirements that are novel or unpredictable are inadequate to preclude federal habeas review. *Patterson*, 357 U.S. at 457-58; *see also NAACP v Alabama ex rel. Flowers*, 377 U.S. 288, 293-302 (1964). Even when a state rule is otherwise adequate, this Court has concluded that a state procedural default provides insufficient reason to bar

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[2] The concurrence in *Beard* stressed that the adequacy requirement should not be applied in a way that "would deprive the States of the case law decisional dynamic that the Judiciary of the United States finds necessary and appropriate for the elaboration of its own procedural rules" 130 S Ct at 620 (Kennedy, J , joined by Thomas, J , concurring) But as Maples's own case illustrates, there is a fundamental difference between the ordinary "decisional dynamic" that results in the even-handed application of procedural rules on a case-by-case basis over time and the inconsistent, illogical, or arbitrary application of an indeterminate rule from one case to the next *See infra* at 29-31

federal review when equities in favor of affording access to federal court exceed the state's interest in enforcing even "a generally sound rule" in a particular case. *Lee*, 534 U.S. at 376; *Flowers*, 377 U.S. at 297 (holding that procedural rule was no bar to Supreme Court review when state court had never applied it with the "pointless severity shown here"). Likewise, procedural defaults will not bar federal review where the enforcement of the default state rule would "force resort to an arid ritual of meaningless form." *Staub v City of Baxley*, 355 U.S. 313, 320 (1958).

B. Petitioners Fail To Account For The Statutory And Equitable Policies Underlying The Adequacy Doctrine

Petitioners urge this Court to scuttle or at least marginalize those principles and make the singular focus of the adequacy inquiry a determination whether litigants have received "fair notice of legitimate state procedural rules." Pet.Br.18 (capitalization omitted). Fair notice is of course constitutionally indispensable. And the requirement that a rule be "firmly established and regularly followed" helps ensure that proper notice generally has been given. But petitioners have a different—and significantly watered down—concept of fair notice from what this Court's precedents have required. Instead of ensuring that the state rule has been consistently applied, petitioners seek to shift the focus simply to whether there are legitimate interests for the rule (as expressed by the state). And, tellingly, petitioners argue (at 11) that, "[b]ecause state rules typically serve any one of many legitimate interests, ... it will be the rare rule that can be said to serve none."

Under petitioners' proposed inquiry, the adequacy doctrine adds little to the equation in determining

whether federal court review has been arbitrarily short-circuited. But the adequacy doctrine reflects and implements important statutory and equitable policies underlying the federal habeas statutes. "The procedural default doctrine ... [is] 'a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.'" *Dretke v Haley*, 541 U.S. 386, 392 (2004) (citation omitted). Petitioners' reconception of the adequacy inquiry not only renders it largely superfluous, it does not account for the fact that under this Court's precedents state procedural rules may prove to be an inadequate to bar federal review for a variety of different reasons—not all of which may be distilled into a one-size-fits-all "fair notice" test.

"[T]he independent and adequate state ground doctrine in federal habeas is somewhat different than on direct review by this Court." *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). On direct review, the existence of "a state law ground that is independent of the federal question and adequate to support the judgment," whether "substantive or procedural," ordinarily makes this Court powerless to render what would be an advisory opinion on any federal question presented. *Id.* at 729. In contrast, even when there is a state procedural default, a federal habeas court nevertheless remains constitutionally and statutorily empowered to decide whether state prisoners are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The existence of that authority is consistent with the fact that the writ of habeas relief ultimately is governed by "equitable principles."

Munaf v Geren, 553 U.S. 674, 693 (2008); *see also Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010).

The willingness of federal courts to abstain from passing upon a constitutional claim presented for federal habeas review is premised on prudential "considerations of comity and concerns for the orderly administration of justice." *Francis v. Henderson*, 425 U.S. 536, 538-39 (1976). These concerns are at their apex when a petitioner fails to comply with a "firmly established and regularly followed" state rule. *Beard*, 130 S. Ct. at 617 (citation omitted). Where states can point to a record of consistency and regularity in applying the underlying default rule, federal courts may be confident that state procedural rules are not be being applied improperly to defeat federal rights or foreclose federal habeas review of federal claims.

At the same time, this Court has observed that federal courts have a "duty to scrutinize the application of state rules that bar [their] review of federal claims." *Cone v. Bell*, 129 S. Ct. 1769, 1782 (2009). That duty serves several important interests. To begin with, as explained, the adequacy analysis prevents a state from arbitrarily barring federal habeas review through inconsistent application of procedural rules. *See, e.g.*, *Hathorn v. Lovorn*, 457 U.S. 255, 262-65 (1982) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims."); *Bouie v City of Columbia*, 378 U.S. 347, 354-55 (1964). When a state court applies a rule inconsistently or arbitrarily, it raises the serious concern that a state may be discriminating against the exercise of federal rights.

Because the legitimacy of a state's interest in the enforcement of its procedural rules is greatly

diminished where those rules are applied irregularly or arbitrarily, the prudential considerations weigh even less heavily in favor of enforcing the procedural bar in such circumstances. As then-Judge Alito explained:

> If inconsistently applied procedural rules sufficed as "adequate" grounds of decision, they could provide a convenient pretext for state courts to scuttle federal claims without federal review. The requirement of regular application ensures that review is foreclosed by what may honestly be called "rules"—directions of general applicability—rather than by whim or prejudice against a claim or claimant.

Bronshtein v Horn, 404 F.3d 700, 708 (3d Cir. 2005) (Alito, J.), *cert denied*, 546 U.S. 2109 (2006); *see id.* (acknowledging that the "pertinent statutory provision ... appears on its face to impose a one-year deadline" but finding such rule inadequate because "strict enforcement of [it] did not begin immediately").

The adequacy analysis also ensures that both habeas petitioners and federal courts have notice of a state procedural rule's requirements and established application. When states have engaged in the process of "elaborating, defining, and then shaping [their] decisional law," *Beard*, 130 S. Ct. at 620, states place litigants "on notice" of their obligations if they want to preserve habeas rights, and place federal courts on notice of the principles that they commit to follow consistently. Where a litigant nonetheless runs afoul of state rules through his own fault, a federal court appropriately declines to consider federal claims that should have first been presented to state courts. The opposite is true, however, where—as here—a state's

courts have studiously and repeatedly eschewed invitations and specific requests from the federal courts to help federal courts perform their important "duty" by clarifying and providing content to a rule that has been applied in an inconsistent or utterly indeterminate fashion. *See infra* at 19-21.

Significantly, the adequacy analysis also ensures that state rules do not unduly burden federal rights. As this Court has recognized, "the mine run of procedural rules, generally serve[] a legitimate state interest." *Lee*, 534 U.S. at 387. But this Court has recognized the importance of ensuring that such state procedural rules—even those serving genuine interests—are not applied to cut off access to federal courts in a manner that would be unjust. *See, e.g., Staub*, 355 U.S. at 320 (a state procedural ground may not preclude federal review when the state rule, even when consistently enforced, "force[s] resort to an arid ritual of meaningless form"); *Lee*, 534 U.S. at 376 (in certain cases, the unyielding application of a generally sound state law would disserve any state interest) It has thus been an almost century-old and bedrock principle of this Court's jurisprudence that "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis*, 263 U.S. at 24 (1923) (Holmes, J.).

C. The Court Should Reject Petitioners' Request To Shift The Ordinary Burden Of Proof On An Affirmative Defense

To overturn the judgment below, petitioners also ask this Court to undercut the adequacy requirement in a more subtle, but nevertheless significant, manner

by asking this Court to shift the burden from the state to prove the adequacy of its rules to habeas petitioners to prove the *inadequacy* of rules. This Court however, already has held that "procedural default is normally a 'defense' that the State is 'obligated to raise.'" *Trest v. Cain*, 522 U.S. 87, 89 (1997) (citations omitted); *see also Gray v. Netherland*, 518 U.S. 152, 165-66 (1996) (Rehnquist, C.J.) (noting in habeas case that "procedural default is an affirmative defense for the [State]"). And it is hornbook law that the proponent of the affirmative defense of procedural default bears the burden of proving the defense (and all of its elements). *See, e.g.*, 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 26.2a, at 1265 n.5 (5th ed. 2005) (in habeas cases, the state bears the burden "not only of asserting that a default occurred, but also of persuading the court that the factual and legal prerequisites of a default ... are present").

The courts of appeals broadly agree and have held that the state bears the burden of proving adequacy. *See Jones v. Sussex I State Prison*, 591 F.3d 707, 716 (4th Cir. 2010), *Scott v. Schriro*, 567 F.3d 573, 582 (9th Cir.), *cert. denied*, 130 S. Ct. 1014 (2009); *Pike v. Guarino*, 492 F.3d 61, 73 (1st Cir.), *cert. denied*, 522 U.S. 1066 (2007); *Smith v. Mullin*, 379 F.3d 919, 927 (10th Cir. 2004); *Combs v. Coyle*, 205 F.3d 269, 276-77 (6th Cir.), *cert. denied*, 531 U.S. 1035 (2000). *But see Sones v. Hargett*, 61 F.3d 410, 416 (5th Cir. 1995) (presuming that a "state court's reliance on a procedural bar functions as an independent and adequate ground in support of the judgment" unless the petitioner can show otherwise); 10-63 Pet.19-20.

Petitioners' argument that state prisoners should bear the burden of establishing the inadequacy of the

state rule makes little practical sense. First, as repeat, institutional litigants, states are far better positioned to demonstrate that a rule is "firmly established and regularly followed" than a state prisoner is able to prove the opposite. Indeed, states can draw on their own experience enforcing the same procedural rules to demonstrate the rule's adequacy in a typical case. In contrast, the inequity of making a state prisoner—often operating pro se or with little means—to prove a negative from analysis of the state's case law is self-evident. Second, the fact that federal courts respect the adequacy of state procedural bars in the large majority of cases, notwithstanding that most circuits place the burden on the state to show the adequacy of their procedural rules, shows that the status quo does not create some insurmountable burden for the state.

Last, petitioner provides no persuasive reason why—in contrast to well-established practice—a habeas petitioner should bear the burden of *disproving* his opponent's affirmative defense. Petitioners' appeal to comity and federalism falls flat. Federal courts already show respect for federalism when abstaining from cases in which a state has *demonstrated* that claims were forfeited pursuant to a firmly established and regularly followed state procedural rule. But where a state cannot show that its rules are firmly established or regularly followed (precisely because of a State's courts refusal to identify how and under what circumstances the bar is to be invoked), this Court has long recognized that federalism considerations do *not* counsel against the federal review of claims.

Habeas petitioners, many of whom have no alternative but to proceed pro se, typically face daunting burdens in challenging their convictions and

sentences and generally bear the ultimate burden of showing that they are entitled to relief. *See, e.g.*, 10-63 Brief of *Amici* Alabama Appellate Court Justices and Bar Presidents in Support of Petitioner 15-16 (discussing the procedural minefield that typically indigent defendants must navigate to seek post-conviction relief in Alabama). But especially considering the gravity of cutting off federal review of potentially meritorious constitutional claims before any hearing on the merits, there is no basis to pile on by saddling habeas petitioners with the burden to *disprove* the affirmative defense of procedural default, including the adequacy of the alleged default rule.

II. THERE IS NO BASIS IN THIS CASE FOR THE COURT TO REWORK, MUCH LESS DISCARD, THE ADEQUACY DOCTRINE

A. This Case Should Be Resolved On The Basis Of Settled Adequacy Principles

California and its amicus urge this Court to depart from the settled requirements for establishing the adequacy of state default rules—including the time-honored requirement that the rule be "firmly established and regularly followed"—and decide this case on the basis of their novel conception of the adequacy doctrine. But the Court should adhere to established precedent and affirm the Ninth Circuit's conclusion that the state simply has failed to meet its burden of showing that the rule at issue is adequate.

This Court has held that "a discretionary state procedural rule *can* serve as an adequate ground to bar federal habeas." *Beard*, 130 S. Ct. at 618 (emphasis added). And, when state courts engage in "the case process" by "elaborating, defining, and then shaping" the principles by which they will exercise the

discretion permitted by a given rule, *id.* at 620 (Kennedy, J., joined by Thomas, J., concurring), nothing makes the exercise of discretion inherently inadequate to bar federal review, *id.* at 618 (majority opinion). But the Court has never suggested that a State may apply a discretionary rule like the one at issue here arbitrarily, or *without* "elaborating, defining, and then shaping" the principles by which discretion may be exercised. As this Court has admonished, "[d]iscretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005); *see id.* ("We have it on good authority that 'a motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'") (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (Va. Cir. Ct. 1807) (Marshall, C.J.)) (alteration in original).

To take an extreme example, no matter how much discretion a state rule might confer, it would be the height of arbitrariness for a state to apply the rule to deny federal rights on the basis of the outcome of a coin toss or a turn of a Magic 8 Ball. The same conclusion follows where a state adopts a discretionary rule but fails to provide any "sound legal principles," *Burr*, 25 F. Cas. at 35, for the exercise of discretion, or applies it in an arbitrary fashion. Thus, if a state rule considered defaulted all post-conviction petitions that were written "sloppily," and the state failed to provide any explanation for why some petitions met that standard and others did not, such a rule would be inadequate to bar federal habeas review. A contrary result not only would license arbitrary state action, but also would

provide a perverse incentive for state courts to *eschew* the case process of elaborating the purposes and principles animating their rules, so as to retain maximum flexibility in future cases.

To avoid the arbitrariness in application made apparent in the record below, California attempts to derive some articulable principles guiding the exercise of discretion under the rule at issue on a case-by-case basis. In doing so, California points to pronouncements by the California Supreme Court in *capital* cases. But less than five years ago, California explained to this Court that its timeliness rules in the capital context pertain to a different process—and serve different policies—than its timeliness rules in noncapital cases like this one. *Evans v Chavis*, 546 U.S. 189 (2006); *Townsend v Knowles*, 562 F.3d 1200, 1207-08 (9th Cir. 2009) (discussing application of California's timeliness rule in capital versus noncapital contexts).

Among other things, the State's objective for encouraging timely petitions is quite different in capital as compared to noncapital cases, given the different incentives that apply in each context. As Justice Stevens observed in his concurring opinion in *Evans*, there are reasons to think that California's different timeliness standards in capital versus noncapital cases reflects the state's intent to specially incentivize capital prisoners to file their petitions for relief more speedily. 546 U.S. at 203 & n.1. In particular, as Justice Stevens explained, "while prisoners on death row often have an incentive to adopt delaying tactics, those serving a sentence of imprisonment presumably want to obtain relief as promptly as possible." *Id*

California's unwillingness (and presumably inability) to defend its case with reference to

noncapital precedents must also be interpreted in tandem with its steadfast refusal to respond to federal courts'—including this Court's—repeated invitations to clarify the principles governing the state's timeliness rules. *See id.* at 199 (suggesting that the Ninth Circuit "might seek guidance [regarding the rule] by certifying a question to the California Supreme Court in an appropriate case"); *Chaffer v. Lockyer*, 546 F.3d 662 (9th Cir. 2008) (Ninth Circuit order seeking such certification). These unanswered federal court pleas for some articulation of the timeliness standards is a telling indication of the lack of any intelligible standards guiding the exercise of discretion. *See Chaffer v Prosper*, No. S166400, 2009 Cal. LEXIS 2693, at *1 (Cal. Mar. 11, 2009). If a state is free to assert a procedural bar on the basis of indecipherable procedural rules even following notice from federal courts (and even this Court, *see Evans*, 546 U.S. at 199) that their rules are unclear, then little will be left of the adequacy doctrine in the context of discretionary rules and states will have no incentives to provide inmates with even the most basic standards governing the exercising of discretion under the case model.

Contrary to petitioners' argument before this Court that its "untimely delay" standard establishes a "clear edict," Pet.Br.37, California's Supreme Court acknowledged—in the capital context—that "no clear guidelines [had] emerged" from California's "untimely delay" standard itself, necessitating the court to provide more specific guidance to capital petitioners. *In re Clark*, 5 Cal. 4th 750, 763 (1993). But whatever guidance California has provided to capital petitioners, California has eschewed every opportunity to provide greater clarity to *noncapital* petitioners through the

case process. As respondent has explained, the California courts have been all over the map in applying the timeliness standards. Resp Br 35-36. That inconsistency is exacerbated by California's "post-card denial" practice of summarily denying petitions for post-conviction relief without providing any meaningful explanation. Resp.Br.8-9. California has failed to provide any sound basis for concluding that it has adopted legal standards for exercising the discretion it touts in a manner that "promote[s] the basic principle of justice that like cases should be decided alike." *Martin*, 546 U.S. at 139.

Given that the state simply declined to accept the Ninth Circuit's request for clarification of its rule, the Ninth Circuit was left with the California Supreme Court's own recognition that its timeliness standard failed to provide "clear guidelines" in the absence of judicial elaboration, and a long litany of summary orders and post-card denials from California's courts failing to provide such elaboration. As such, the Ninth Circuit hardly broke ground—or improperly intruded on state prerogatives—by concluding that California's timeliness rule provided no "clear standards" to habeas petitioners outside the capital context in which this case arises. *Martin v Walker*, 357 F. App'x 793, 794 (9th Cir. 2009) (quoting *Townsend*, 562 F.3d at 1208).

Discretionary rules appropriately reserve *discretion* for their application in individual cases. And thus, as California observes, state courts need not "articulate in advance *all* of the parameters of their procedural rule or all possible justifications or every factual scenario that will qualify for an exception in order to obtain a finding of adequacy." Pet.Br.39 (emphasis added). But at the same time, to be

adequate, even discretionary rules must operate as *rules*—*i.e.*, they must be guided be some articulable principles that help ensure that like cases are decided alike. *See, e.g.*, Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 758 (1982) ("The jurisprudential rule of like treatment demands consistency not only between cases that are precisely alike but among those where the differences are not significant."). That is especially true when it comes to applying state rules to deprive inmates of federal rights and effectively bar access to the federal courts for habeas relief. In the typical case, this ought not be a particularly difficult threshold for a state rule to pass. But, as respondent has explained, California has simply failed to establish that the indecipherable rule at issue in this case meets that minimum threshold.[3]

Finally, it bears noting that, while California alleges that the "delay" in this case should be calculated as "nearly five years," Pet.Br.5, the state has not argued that the adequacy of California's timeliness bar turns on the particular length of delay in this case. Rather, the state has contended that this case should be resolved based on whether the state's rule is adequate as a general matter and the state defended the rule in

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[3] Even assuming, *arguendo*, that a state could adopt a discretionary rule that is intended to be entirely standardless—leaving judges to determine whether a petition was defaulted merely on whim—California has never suggested that the rule at issue is such a rule. At minimum, the state's failure to provide "fair notice" to petitioners (or federal courts) that its rule was intended to apply in such a manner weighs heavily against such an interpretation. As such, California may not escape the charge that its rule has been applied in a standardless and arbitrary manner simply by invoking the shibboleth of "discretion."

all its application. *See* Pet.Br.33-44. As a result, there is no basis for deciding this case on the ground that—whatever may be true for a shorter period of delay—the rule was adequate as applied in this particular case.

B. This Case Is Hardly Representative Of The Typical Case In Which The Adequacy Issue Arises On Federal Habeas

According to the state, the timeliness rule at issue here involves a discretionary standard that nevertheless establishes a "clear edict," Pet.Br.37, providing "fair notice to petitioners" about what they must do to preserve federal claims, Pet.Br.34. Respondent persuasively debunks that contention But to the extent that this case is properly viewed as testing the adequacy limits of such a discretionary standard, it presents far different considerations than a case, for instance, in which the state is alleged to be applying a *non-discretionary* procedural bar in an arbitrary or inconsistent manner. *See, e g , Edwards v. Carpenter*, 529 U.S. 446, 450 (2000); *Ford v. Georgia*, 498 U.S. 411, 425 (1991); *Maples v Allen*, No. 10-63.

As this Court's own precedents illustrate (and countless other lower court cases underscore), the fact pattern presented here represents only one of many different kinds of adequacy issues that are typically presented to the courts. *Compare, e g., Patterson*, 357 U.S. at 457-58 (determining whether a novel state procedural rule may be adequate, notwithstanding that "in retrospect," it appeared to "form part of a consistent pattern of procedures") *with Ford*, 498 U.S. at 425 (analyzing adequacy given state's "inconsistent application of [its] rule," and other deficiencies); *Lee*, 534 U.S. at 376 (finding that "generally sound rule" that was applicable to petitioner's case was

nevertheless inadequate to stop consideration of federal question); *Davis*, 263 U.S. at 24-25 (noting that "local practice shall not be allowed to put unreasonable obstacles in the way" of federal review) (Holmes, J.).

Even petitioners recognize that the adequacy issue arises in "different contexts." Pet.Br.9. Because the adequacy issue presented by this case is relatively unusual, this case presents an ill-suited vehicle to provide any broad pronouncements concerning the adequacy doctrine, much less to retool the doctrine altogether. *Cf. Beard*, 130 S. Ct. 619 ("The procedural default at issue here—escape from prison—is hardly a typical procedural default, making this case an unsuitable vehicle for providing broad guidance on the adequate state ground doctrine."). And whatever this Court concludes regarding the kind of standardless, "discretionary" rule here, the adequacy doctrine is necessary to protect against the arbitrary or unduly burdensome application of non-discretionary rules—like the rule at issue in *Maples*, *see infra* at 29-31[4]—to foreclose federal court review of constitutional claims.

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[4] As noted, the state rule at issue in Maples's case authorizes relief when a petitioner failed to appeal within the proscribed time and that failure was without fault on petitioner's part. When the petitioner is without fault, the rule by its own force *entitles* a petitioner to bring an untimely appeal *See* 10-63 Pet 13-14, 10-63 Reply 6-7 In *Maples*, the State has not disputed that the no-fault element is met. *Maples* thus presents a more conventional application of the adequacy doctrine in the context of a non-discretionary rule that has been inconsistently and arbitrarily applied by the state court to defeat federal rights.

C. The Court Should Reject CJLF's Shrinking Suggestion To Scrap The Adequacy Doctrine In Favor Of A Cause-and-Prejudice Standard

As discussed, petitioners argue that the adequacy doctrine should be substantially scaled back, even though they never argue that any particular precedent should be overruled. Petitioners' amicus, CJLF, however, goes even further. It has argued that "[t]here is no need for a separate adequacy inquiry on habeas corpus" at all. CJLF.Br.6. Instead, CJLF argues that the "cause and prejudice" and "actual innocence" exceptions fully serve the federal policies promoted by adequacy review. *Id.* CJLF made this far-reaching argument an emphasis of its briefing recommending certiorari, but in its amicus brief in support of the State at the merits stage it essentially relegates the argument to a paragraph. CJLF.Br.28.

For several reasons, CJLF's suggestion that the Court should "scrap" the adequacy doctrine should be rejected To begin with, the State did not raise this argument below or on its petition for certiorari. And as respondent explains, that alone suggests that this Court should not review this additional question. Resp.Br.60-63 This Court generally does not consider additional questions presented only by amici. *See, e.g.*, *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981). And while CJLF blithely suggests that this Court should dispense with a doctrine embedded in nearly a century's worth of case law, it does not even mention the *stare decisis* factors governing this Court's decision whether to dismantle settled precedent. *Cf*

Randall v. Sorrell, 548 U.S. 230, 263 (2006) (Alito, J., concurring in part and concurring in the judgment).[5]

In any event, the CJLF argument is as misguided as it is unsupported (tellingly, CJLF fails to cite a single decision that would support its peculiar suggestion to replace the adequacy doctrine with the cause-and-prejudice standard, *see* CJLF.Br.28). This Court's inquiries into the adequacy of a rule, and whether a petitioner may demonstrate "cause and prejudice" from the rule, serve distinct purposes. The focus of cause-and-prejudice analysis is generally on whether an *external* event prevented a petitioner from proceeding in accordance with state law. Thus, notwithstanding a petitioner's failure to comply with even a crystal clear, firmly established, and regularly followed state rule, a petitioner may show "cause" for failure to comply with such a rule because, for instance, "something *external* to the petitioner, something that cannot fairly be attributed to him" prevented compliance. *Coleman*, 501 U.S. at 753.

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[5] CJLF's revisionist account that this Court's concern with "less-than-strict[ly]" applied rules was driven primarily by the unique historical concerns present during the Civil Rights era, and so is immaterial today, *see* CLJF Br.19-21, cannot be squared with the historical record. This Court's adequacy doctrine was well-established before the Civil Rights era began. *See, e.g., Davis*, 263 U.S. at 24, *Ward v. Board of County Comm'rs*, 253 U.S. 17, 22-23 (1920) (listing cases dating back to late 1800s). And notwithstanding CLJF's speculation that the concerns driving the adequacy analysis are somehow a "faint shadow of what it was in 1964," CJLF Br.21, this Court has deemed state procedural rules inadequate to bar federal review many times in the nearly five decades since. *See, e.g., Lee*, 534 U.S. at 376 (2002), *Ford*, 498 U.S. at 425 (1991); *James*, 466 U.S. at 348.

For example, if a firmly established and regularly followed state timeliness rule required litigants to file within six months, the rule would be adequate. But a state prisoner could demonstrate "cause" for failure to comply if it were shown that the state prison deliberately discarded all requests for post-conviction relief. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986) (cause would be demonstrated if "some interference by officials made compliance impracticable") (internal quotation marks and citations omitted).

In contrast, the focus of adequacy doctrine is properly on the *rule itself*—namely, whether it serves legitimate state interests, whether it is "firmly established and regularly followed," whether it provides fair notice to defendants, and whether it unduly burdens the presentation of federal rights. An inadequate rule is no bar to federal rule regardless of whether a litigant can show cause for failure to comply.

Maples graphically illustrates how the adequacy and cause-and-prejudice inquiries may diverge in individual cases. Maples has argued that the state's procedural rule governing out-of-time appeals is an inadequate basis on which to bar federal review of his constitutional claims because the state rules authorize relief when a failure to appeal was without fault on petitioner's part, and other courts had granted relief on directly analogous facts. At a minimum, the rule that the state invoked in his case was not "firmly established and regularly followed." *See infra* at 29-31. But even assuming that the rule were adequate, a different series of events would establish cause (and prejudice) to excuse any procedural default.

As explained in Maples's petition, Maples failed to receive timely notice of the denial of his post-conviction

petition because his pro bono attorneys of record left their firm without notifying the state court, the letters mailed to counsel were returned to the state clerk unopened and stamped "Return to Sender—Left Firm," and when the state court clerk received the returned letters the clerk did nothing but stick them in a file. 10-63 Pet.6-7. The state court clerk's failure to do anything upon receiving the returned and unopened letters addressed to counsel violates due process under *Jones v Flowers*, 547 U.S. 220 (2006), and thus provides cause to excuse any procedural default, even assuming the alleged default rule was adequate to begin with. *See* 10-63 Pet.6-7; 10-63 Reply Add.7a-8a.[6]

CJLF loses sight of the fact that the adequate state ground rule does not simply create administrative liabilities, but rather often leads to the vindication of meritorious claims. Even in capital cases, where the incentives to follow state procedural rules are at their apex, many prisoners run afoul of state procedural rules. Such a forfeit may be a matter of life and death, given that this Court has long recognized that "a substantial proportion of [state] prisoners succeed in having their death sentences vacated in habeas corpus proceedings." *Murray v. Giarratano*, 492 U.S. 1, 14

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[6] Petitioners suggest in passing that this Court's development of the "cause and prejudice jurisprudence" "obviates any need to treat individual cases of injustice as instances of alleged 'inadequacy' of the state rule itself" Pet Br.12 (citing *Lee*, 534 U S at 376) The case they cite (*Lee*), however, itself substantially post-dates the development of this Court's "cause and prejudice" exception *See, e g , Murray*, 477 U S at 489 Again, the Court's development of its "cause and prejudice" test in no way diminishes the continuing vitality of its precedents for determining the adequacy of a state rule itself

(1989) (Kennedy, J., concurring in the judgment). The policies promoted by this Court's adequacy doctrine remain strong today, and the availability of the adequacy doctrine to protect against the arbitrary elimination of federal rights—and access to federal court review on habeas corpus to protect those rights—remains vitally important.

III. MAPLES'S CASE UNDERSCORES THE NEED FOR THE ADEQUACY DOCTRINE TO PROTECT AGAINST THE ARBITRARY DENIAL OF FEDERAL COURT REVIEW

Maples's case vividly illustrates the continued importance of adequacy review to ensure that federal courts are not arbitrarily closed to litigants with serious constitutional claims. 10-63 Pet.12-24. Unlike the discretionary, judge-made timeliness rule at issue in this case, *Maples* involves the state's inconsistent application of a non-discretionary, written procedural rule. *Cf. Bostick v Stevenson*, 589 F.3d 160, 165 n.6 (4th Cir. 2009) ("We also note that the state courts' inconsistent application of [South Carolina] Rule 59(e) here is clearly distinguishable from the Supreme Court's recent decision in *Beard v. Kindler* .... In *Kindler*, the Court held only that facially discretionary state rules can be adequate to preclude federal habeas review. We do not read *Kindler* to apply to facially mandatory rules that state courts nonetheless apply arbitrarily.") (internal citations omitted).

As noted, the rule in *Maples* on its face provides for relief when the default "was without fault on petitioner's part," Ala. R. Crim. P. 32 1(f) (1990), and the state does not dispute that the missed deadline in *Maples* occurred through no fault of Maples himself. Well prior to the missed deadline in Maples's case, the

Alabama courts had answered in the affirmative "whether Rule 32 ... permits an out-of-time appeal from the denial of a petition for post-trial relief," *Fountain v. State*, 842 So. 2d 719, 720 (Ala. Crim. App. 2000), *aff'd in relevant part*, *Ex parte Fountain*, 842 So. 2d 726 (Ala. 2001), including on directly analogous facts. *Marshall v. State*, 884 So. 2d 898, 899 (Ala. Crim App. 2002), *rev'd on other grounds*, 884 So. 2d 900 (Ala. 2003); *Thompson v. State*, 860 So. 2d 907, 909-10 (Ala. Crim. App. 2002). The Eleventh Circuit majority nevertheless held that the alleged default rule was adequate to *foreclose* federal habeas review of Maples's ineffective-assistance-of-counsel claims.

The Eleventh Circuit's divided decision flouts this Court's decisions holding that a state default rule is not adequate to bar federal habeas review unless it is "firmly established and regularly followed." Indeed, if there has been a consistent rule in circumstances like Maples's, it has been to *allow* untimely appeals. 10-63 Pet.15. The manner in which the Eleventh Circuit arrived at its conclusion that the alleged default rule was adequate was equally flawed and out of step with this Court's precedents. The court improperly engaged in a *post hoc* reformation of Alabama law, ultimately coming up with a tripartite framework based on distinctions never drawn by the Alabama courts. *See Patterson*, 357 U.S. at 457. The court improperly relied on Alabama case law decided *after* the alleged default, which by definition could not have given Maples any notice of the asserted default rule. 10-63 Pet.20. And, rather than requiring the state to show that the alleged default rule was adequate, the Eleventh Circuit shifted the burden to Maples to demonstrate the inadequacy of the alleged rule. 10-63 Pet.19-20.

As illustrated by Maples's case, adequacy review remains an essential check to ensure that federal court review of constitutional claims is not arbitrarily thwarted by the novel or inconsistent application of state law. Indeed, the state's attempt to preclude federal habeas review of Maples's constitutional claims reflects the kind of "gotcha" mentality that this Court long ago repudiated. *See Davis*, 263 U.S. at 24. No matter how the Court ultimately resolves the adequacy question in this case, it should ensure that the adequacy doctrine remains available to protect against the deprivation of federal habeas review in circumstances like those presented in *Maples*.

CONCLUSION

For the foregoing reasons, the Court should reject the invitation of petitioners and their amicus to revamp or discard the adequacy doctrine, and decide this case in favor of respondent in accordance with settled principles governing the adequacy of state rules.

Respectfully submitted,

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